Field

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 162.

GEORGE E. KETCHUM ET AL.,
Appellants,

vs.

THE COUNTY OF ST. LOUIS,
Intervenor, Respondent.

LAWS OF MISSOURI.

Act of February 10th, 1864.
Act of January 7th, 1865.
Act of March 31, 1868.

Judd & Detweiler, Printers, Washington, D. C.

LAWS OF MISSOURI.

AN ACT for the extension and completion of the Pacific Railroad to the western boundary of the State at Kansas City, and the North Missouri Railroad to the Iowa State line; to complete the Southwest Branch of the Pacific Railroad, and to reduce the State indebtedness.

SECTION

1. Pacific Railroad authorized to borrow money; bonds may be issued; conditions of bonds; *proviso* about sale of bonds; State lien relinquished on certain part of the road; how net profits to be applied; *proviso* about sale of road; *proviso* about State's right to redeem said road.
2. Fund Commissioner established; how long to continue; Governor to appoint a Fund Commissioner; to be confirmed; to give bond; where bond filed; may be dismissed; salary fixed; to file monthly account of expenses in Secretary of State's office; this act to be submitted for acceptance in sixty days; proceedings on being accepted; proceedings on not beng accepted.
3. Pacific Railroad to deliver to Fund Commissioner its bonds; denomination of bonds; Commissioner to negotiate said bonds; where funds to be deposited: how drafts to be indorsed; interest to be drawn on deposits; failure to deliver bonds, what forfeiture.
4. Commissioner to use funds in constructing the road; how payments to be made.
5. Directors to be classified; term of each class; qualifications of directors.
6. Mortgage bonds may be issued; conditions of bonds; how executed; how secured and how sold; proceeds, how used; when main line of road may be sold; minimum price not to be below a certain amount; proceeds of sale, how used; notice of sale; obligation to issue bonds imperative.
7. Net earnings of road, how applied; Commissioner to examine books and affairs of the company; report to Governor condition of things, if bad.
8. Bondholders of Missouri bonds may make certain investments; road may enlarge capital to a certain extent; certain stocks preferred in payment of dividends; State lien, how far released.
9. Superintendent to provide pay-rolls and furnish Commissioner with same; monthly reports to be made.
10. Contracts for work to be advertised; proposals to be recorded; who entitled to contract; how many miles one contractor may have; fifteen per cent. of contract price to be retained, when.
11. Railroads to accept or reject this act; proceedings in such case.
12. Chariton and Randolph and Missouri Valley Railroad Companies may transfer all stock, etc., to North Missouri Railroad; when so so done, what name shall assume; franchises vested to be considered transferred; nature, amount, condition, etc., of bonds to be issued

by North Missouri Railroad; no lien created on West Branch for liabilities of North Missouri Railroad; one road not liable for the other.

13. North Missouri Railroad may issue bonds; what for; condition, nature, amount, etc., of bonds; how proceeds applied; certain sections to apply to the North Missouri and West Branch Railroad; intent of act stated.
14. Certain roads may form a connection; may condemn right of way.
15. Pacific Road to construct Southwest Branch; sell lands donated; to be completed to certain point in fourteen months.
16. Pre-emption right reserved to certain persons; price to be paid for lands hereafter.
17. Notice to be given for land purchasers to pay up, when; failure to pay forfeits right to purchase.
18. Acts contrary hereto repealed.

Be in enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. The Pacific Railroad Company is hereby authorized to borrow money for the completion of the main road to Kansas City, and for this purpose may issue not more than one thousand five hundred bonds, of one thousand dollars each, bearing interest at the rate of not more than seven per centum per annum, with coupons attached, and having four, five, and six years to run, in equal proportions: said bonds to be secured by a first mortgage on the main line of the road west of Dresden, and as much of the proceeds of said bonds as may be necessary shall be applied to the completion of the road from its present terminus to Kansas City, and to no other purpose; said bonds shall only be negotiated or sold as the money is required for the payment of work done or under contract. *Provided, however,* That all of any one class of bonds may be sold at one time; and the State of Missouri, for this object, and to this amount and extent only, hereby relinquishes her first lien and mortgage and right of forfeiture upon said road west of Dresden, retaining, however, a second lien and mortgage thereon, such second lien and mortgage to become forthwith the first lien and mortgage in every respect, and as fully as now held by the State, upon the payment in full of principal and interest of the bonds authorized by this act. All the net profit sof the road shall be applied to the extension and equipment thereof until completed as aforesaid, reserving, however, sufficient for the payment of the interest accruing semi-annually on said bonds actually sold, and after completion of the road any surplus over the accruing interest

shall be applied to the purchase or payment of the bonds themselves: *Provided*, That no sale of the road west of Dresden, as aforesaid, or any interest therein, or therewith connected, on account of the non-payment of such interest or principal, shall be made before notice in writing of such failure has been first given to the Governor and Secretary of State, and until twelve months shall have elapsed after such notice, before such sale. *And it is further provided*, That the State, through the Governor or any agent appointed by the General Assembly of the State, shall have the right to redeem said railroad from any sale under the provisions of this act by the bondholders or mortgagees, or buy in the same at any such sale; and upon the payment, or tender of payment, of the amount of such mortgage, with interest, by the State, all the rights and privileges of the Pacific Railroad Company in and to said railroad, depots, lands, rolling stock, machine shops and other appurtenances, shall be vested in the State, and the Governor of the State shall take possession of the said road, without any suit or sale.

SEC. 2. The office of Fund Commissioner is hereby created, and shall continue until the bonds issued for the completion of the road, and the State bonds loaned to said railroad company, with interest thereon, are fully paid out of the earnings, or exchanged for the first mortgage bonds of said road, as hereinafter provided. It shall be the duty of the Governor to appoint a Fund Commissioner, subject to the approval and confirmation of the Senate, at this or the ensuing session of the General Assembly, who, before entering upon the duties of his office, shall file in the office of the Secretary of State a bond for the faithful performance of his duties under this act, conditioned according to law, to the State of Missouri, in the penal sum of not less than one hundred thousand dollars, the securities wherein shall be first approved by the Governor. The salary of said Fund Commissioner shall be four thousand dollars per annum, and shall be in full compensation for all his services. The Fund Commissioner may be dismised by the Governor for any malfeasance in office, and all his official acts, the books, papers, and accounts of his office shall be at all times subject to his inspection and control. He shall file a monthly return of the receipts and expenditures of his office, in the office of the Secretary of State, showing the balance then on hand. Within sixty days from the passage of this act, the directors of the Pacific Rail-

road Company shall cause said act to be submitted to the stockholders thereof for acceptance, and if the same is accepted by a majority of the said stockholders in interest, the directors shall immediately certify such acceptance in writing to the Secretary of State; and in failure thereof, the Governor is hereby directed and required to proceed forthwith thereafter to the forfeiture and sale of said road, and fix a minimum price for which it shall be sold: *Provided*, That upon the sale of said road according to law, the price and sum for which the road shall be sold shall not be less than the amount of bonds and coupons issued to said road remaining unpaid; and if said sum is not realized by and at such sale, the Governor of the State shall, by himself or agent, buy in the same, for and in the name of the State of Missouri. In case such sale and purchase by the Governor in behalf of the State, he is hereby empowered and authorized to operate the road, in the same manner and with like authority as the president and directors of said road are now by law authorized, with such modifications and changes in the detail thereof as may be by him deemed beneficial to the interests of the State, until the Legislature shall make such provisions in regard to said road as in their judgment may be deemed expedient.

SEC. 3. The Pacific Railroad Company are hereby required to deliver to said Fund Commissioner, within a reasonable time after he shall be appointed and qualified, the bonds of the company hereby authorized to be issued, to the amount aforesaid, in bonds of one thousand dollars each, having four, five and six years to run, in equal proportions, and bearing interest at a rate not exceeding seven per centum per annum, with coupons attached, payable semi-annually at the Bank of Commerce in the city of New York; whereupon, in order to give validity to such bonds, the State relinquishes to that extent, and for that object solely, as aforesaid, her first lien and mortgage upon said road west of Dresden, as aforesaid. The Fund Commissioner shall thereupon proceed to negotiate said bonds, as provided in section one of this act, at such prices as may be obtained therefor, subject, however, to the approval of the Governor and president of the railroad company before such sale; the proceeds thereof shall be deposited in the Boatmen's Saving Institution in St. Louis, or such other institution or bank as the Governor may direct, subject to the draft of said Fund Com-

missioner, for the purpose of the completion and equipment of the road, in sums not greater than fifty thousand dollars at any one time, which draft shall be indorsed by the Governor before the same is paid: *Provided*, That said institution or bank shall pay on such deposits such interest as may be agreed upon. All gross earnings of said road, from all sources, shall be paid in daily to said Fund Commissioner, and all other sources of revenue, belonging to or connected with said railroad, shall be under his control, and be taken into his possession as they arise, and be deposited daily in the institution or bank aforesaid; and upon failure of said railroad company to pay said money to said Fund Commissioner, as herein provided, the said company shall forfeit and pay to the State of Missouri, for each and every such neglect or refusal, the sum of ten thousand dollars, to be recovered as other forfeitures.

SEC. 4. Said Fund Commissioner shall, out of all moneys arising from the sale of bonds, as aforesaid, upon proper vouchers, pay for the construction of the extension and equipment of said road, as aforesaid; and out of all other moneys derived from other sources, as before designated, in his hands and under his control, upon proper vouchers and receipts, he shall pay for the operating of the road; the payment for said construction and equipment shall be made upon the vouchers of the chief engineer of said road, approved and countersigned by the president, specifying in proper detail the amounts and character thereof; and the payment of operating the road shall be made upon the vouchers and certificates of the superintendent of the road, approved by the president and chief engineer.

SEC. 5. The Board of Directors shall classify themselves into three divisions, viz: the first, consisting of four members, to serve until the annual election of 1864, the second consisting of four members to serve until the annual election of 1865; and the third consisting of five members to serve until the annual election of 1866; and all annual elections are to be for four or five directors, to serve for three years, and to fill the places thus becoming vacated. The directors must be citizens of the State of Missouri, and have resided in the same at least three years. The directors shall elect their president and vice-president annually.

SEC. 6. It shall be lawful for the Pacific Railroad Company to issue first mortgage bonds, having not more than

twenty-five years to run from the date of their issue, and bearing interest at six per centum per annum, payable semi-annually, to the amount of the State bonds loaned to said main road, together with all interest due and unpaid; said mortgage bonds shall have the effect of first mortgage upon said road only to the extent of their exchange for bonds of the State, when the same are delivered up and canceled with unpaid coupons attached; these first mortgage bonds shall be countersigned by the Auditor of the State and delivered to the said Pacific Railroad Company, for a return to him of an equal amount of State bonds, including interest due and unpaid, with unpaid coupons attached. And the first mortgage bonds thus issued shall share in the security now held by the State in said main line of the Pacific Railroad, in proportion that their amount may bear to the bonds and coupons remaining unpaid, and which have been issued by the State for the benefit of the said main line; so that in case of the sale of said main line railroad, by default or otherwise, the proceeds of said sale shall be divided in proportion as aforesaid, between the State and the holders of said first mortgage bonds; and the holders of such first mortgage bonds, thus substituted, shall have no power, by virtue of such substitution, to cause the main line of said railroad to be sold under the first mortgage held by the State, except in pursuance of the provisions of this section. And whenever the amount of State bonds and interest coupons thereon shall be so exchanged for said first mortgage bonds, in the aggregate equal to three-fourths of the amount of the State bonds and interest coupons thereon outstanding and unpaid at the time of the passage of this act, and which may have been issued by the State for the benefit of the main line of the Pacific Railroad, the holders of said first mortgage bonds, after the fifteen hundred construction bonds, with interest thereon, authorized to be issued by the first section of this act, shall be fully satisfied and paid by said railroad company, shall have the right and authority, by virtue of said substitution, to sell said main line of the Pacific Railroad, rolling stock, franchises, and other property belonging thereto discharged from the mortgage lien of the State, if, after the payment, as aforesaid, of the said fifteen hundred construction bonds, the said Pacific Railroad Company shall make default in the payment of the interest on the said first mortgage bonds so substituted, or shall make default in the

payment of the bonds themselves when they shall become due: *Provided*, That the minimum price for which said railroad shall be sold shall not be less than three-fourths of the amount of the then outstanding State bonds and interest coupons thereon remaining unpaid or unexchanged, so issued by the State for the benefit of the main line of the Pacific Railroad, and the amount of the said first mortgage bonds and interest thereon then remaining outstanding and unpaid: *And provided further*, that if said railroad shall bring any amount over and above that which may be required to pay off the then outstanding State bonds and interest thereon, issued for the benefit of the said main line, and the said first mortgage bonds and interest thereon remaining unpaid, said amount shall be paid to the said Pacific Railroad Company. Six months' public notice shall be given of the time and place of sale of said railroad, in such manner as may be prescribed by the Governor of the State of Missouri. *And provided further*, That the obligation upon the Pacific Railroad Company to issue said first mortgage bonds, in all cases where State bonds and coupons, issued by the State for the benefit of the main line of said railroad, may be presented in pursuance of this section, shall be imperative.

SEC. 7. It shall be the duty of the Fund Commissioner to apply the net earnings of the road, after paying the expenses of his salary, first, as provided in section one; second, to the payment of interest as the same shall become due and payable on the first mortgage bonds issued and exchanged, as provided in section six, and next, not to exceed six per centum divided on the preferred stock, as provided in section eight, and the surplus, if any, to the purchase of the outstanding State bonds, with interest coupons thereon, at the best market rates. *Provided, however*, that in purchasing said bonds the price to be paid for them shall first be approved by the Governor. It shall be the duty of the Fund Commissioner, further, to examine, from time to time, the books, papers and accounts of the road: and if, at any time, it shall appear to him that the same are not properly kept, the gross receipts of said road, or any part thereof, are not promptly paid over to him, or that irregularities exist in the construction or conduct of the road, to call the attention of the Governor thereto, whose duty it shall be to examine into, and correct such irregularities, in such manner as in his judgment may be deemed right and proper.

SEC. 8. The holders of bonds of the State of Missouri, issued to the Pacific Railroad Company, are hereby authorized to invest said State bonds in the capital stock of said corporation, and the Pacific Railroad Company, upon the deposit of such bond or bonds with the treasurer of the State of Missouri and the cancelling of the same, are hereby authorized to enlarge the capital stock of said corporation to an extent equal to the amount of bonds so invested, and to issue to the holder or holders of said bond or bonds, certificates of full paid stock for the amount of the bond or bonds so deposited and canceled; said stock to be preferred in the payment of dividends which may accrue or be made payable from the earnings of the road, in preference to any stock now issued or may be issued, for any subscription to the capital stock, by virtue of any contract or other agreement made prior to the passage of this act; but no dividend on any such preferred stock shall exceed the rate of six per centum per annum, until the amount due by said Pacific Railroad Company to the State of Missouri, for all liabilities incurred, and for advances made, are fully paid. And nothing in this section shall be construed to release the State lien upon said road, as now provided for by law, only so far as the same may be made applicable to the issuing of the bonds herein specifically provided for in the first section of this act, as aforesaid.

SEC. 9. It shall be the duty of the Superintendent of the Pacific Railroad to provide that all the pay-rolls for all the monthly payment of the employees on the railroad are made out correctly, and furnished to the Fund Commissioner on the fifteenth day of each month, as also the proper vouchers for all articles or materials purchased, which may be necessary for the operation of the road. Monthly reports of the condition of the road, together with a full statement of the business of the same, shall be made by him to the Governor of the State, who shall cause the same to be filed in the office of the Secretary of State; and any outlay deemed necessary, beyond and outside of the actual operating expenses, by the directors of the road, shall be first approved by the Governor and chief engineer before the same shall be paid by the Fund Commissioner.

SEC. 10. All contracts for the work required for the extension of the Pacific Railroad to Kansas City shall be advertised for at least one month in such of the public papers

in Missouri, Chicago, Illinois, Cincinnati, Ohio, and the city of New York, as the directors may select; and all proposals shall be recorded in a proper book, kept for that purpuse, in the railroad company's office. At the time of allotting the work, the lowest responsible bidder shall be entitled to the contract, which shall not exceed ten miles in length; fifteen per centum of the amount agreed to be paid upon any such contracts shall be retained until the contract is fully completed; and if it shall appear that said contract has not been fully and faithfully performed, or that the party or parties to said contract have been, directly or indirectly, through themselves or others, interested in any other contract, while the first is incomplete, then the per centum thus retained, and any other balance remaining unpaid, shall be considered as forfeited to said railroad company as liquidated damages.

SEC. 11. Within sixty days from the passage of this act the stockholders of the Pacific Railroad Company, and of the North Missouri Railroad Company, are hereby authorized and empowered to assemble for the purpose of accepting or rejecting the provisions thereof, by a vote of a majority in interest thereof; and the acceptance of this act shall be filed in the office of the Secretary of State, and the same shall be binding upon said companies respectively; and for the purpose of carrying out the intent of this section, it is made the duty of the presidents of the several railroad companies provided for in this act, within fifteen days after its passage, to call together the stockholders of their respective companies, giving not less than ten days' notice of the time and place of such meetings, in such newspapers as may be selected by them for such purpose.

SEC. 12. The Chariton and Randolph Railroad Company and the Missouri Valley Railroad Company may, by a vote of a majority of their stockholders in interest, transfer and assign to the North Missouri Railroad Company all of their effects and assets, rights and privileges under their respective charters, and all the work that has been done in the construction of the said roads; and upon such transfer being accepted by the North Missouri Railroad Company, the said Chariton and Randolph Railroad Company and the Missouri Valley Railroad Company shall cease to have a corporate existence, and shall be styled and known as the West Branch of the North Missouri Railroad; said West Branch

to commence at the town of Moberly, in the county of Randolph, on the North Missouri Railroad, and extend west along the route adopted by the Chariton and Randolph Railroad Company, to the city of Brunswick; and thence on or near the present survey of the Missouri Valley Road to Richmond, in Ray county; and from thence by the most advantageous and practible route to some point on the north side of the Missouri river, at or below St. Joseph. And all the franchises vested in the said Chariton and Randolph Railroad Company and the Missouri Valley Railroad Company shall become, by such transfer and acceptance as aforesaid, fully and completely vested in the North Missouri Railroad Company. *Provided, however*, That if the transfer and acceptance aforesaid is not made by and between the said Chariton and Randolph Railroad Company, the Missouri Valley Railroad Company, and the North Missouri Railroad Company, and a connection thereby formed, as is contemplated may be done by this act, then, and in that event, the Missouri Valley Railroad Company shall have full power to issue the same amount in bonds herein provided to be issued by the North Missouri Railroad Company for the benefit of the said West Branch of the North Missouri Railroad as aforesaid; said bonds, when issued by the Missouri Valley Railroad Company, to be issued in like manner, with like effect, and with the same lien on the Missouri Valley Road, in all respects, and to all intents and purposes, as if the same had been issued by the North Missouri Railroad Company for the benefit of said West Branch. *And provided further*, No connection formed by and between the Chariton and Randolph Railroad Company, the Missouri Valley Railroad Company and the North Missouri Railroad Company, shall operate or have the effect to create any lien upon the said West Branch aforesaid for any liabilities of said North Missouri Railroad, or for any State bonds issued for the benefit of said road prior to the transfer, acceptance, and connection provided for as herein aforesaid shall have been made. *And provided further*, That the said West Branch shall not be liable for any of the indebtedness or liabilities of the main line of said North Missouri Railroad; that the accounts and business of the said North Missouri main line and the said West Branch shall be kept separate and distinct from each other, so that one road shall not become or be held liable for the liabilities and indebtedness of the other.

SEC. 13. For the purpose of enabling the North Missouri Railroad Company to complete the main road to the Iowa State line, and also for the purpose of enabling them to construct the West Branch aforesaid, and for the purpose of building a bridge across the Missouri river at or near the town of St. Charles, on which the said company can cross its trains, said company is hereby authorized to borrow money to the amount of two millions of dollars, and to this end may issue two thousand bonds, of one thousand dollars each, bearing interest at the rate of not more than seven per centum per annum, with coupons attached, payable semi-annually, the principle having four, five, six, seven, eight, nine, and ten years to run in equal amounts; said bonds to be secured by a first mortgage on the main line of the road north of Macon City, and on the West Branch aforesaid. That the lien on said West Branch shall only extend to that part and portion of the road constructed with the proceeds of the bonds issued for the same, and on the stock of the North Missouri Railroad Company in said Bridge Company on the bridge aforesaid; and the proceeds of the bonds to be applied to the completion of the main trunk from its present terminus to the Iowa State line, and to the extension of the West Branch aforesaid, and to the building of the bridge aforesaid, the application thereof to be in the following proportions, to wit: the proceeds of one thousand of said bonds to the completion thereof to the Iowa State line, and the proceeds of seven hundred thereof to the extension of the West Branch aforesaid, and the proceeds of three hundred thereof to the building of said bridge. And all the provisions of this act in reference to the Pacific Railroad aforesaid, in sections one, two, three, four, six, seven, eight and nine thereof, are to be applied to the North Missouri Railroad, the West Branch thereof, and the said bridge and the company, as fully and effectually as the same are applicable to the said Pacific Railroad; and all the conditions and stipulations, liabilities and requirements of said sections, are hereby imposed upon said North Missouri Railroad and the West Branch thereof, as fully and obligatory as if the same were in this section recited. The intent and purpose of this provision being that the Pacific Railroad and its Company, and the North Missouri Railroad and the West Branch thereof and their Company, shall be placed under equal conditions, restric-

tions and liabilities, and be sharers of the benefits granted in this act equally, according to the provisions thereof.

SEC. 14. The North Missouri and Iron Mountain Railroads are hereby authorized to connect their line of road with the main line of the Pacific Railroad, in the county of St. Louis, if the Board of Directions of said roads agree, and find it to the interest of said roads, and for that purpose are authorized to condemn the right of way over any lands whatsoever, in conformity with the rights granted to them in their respective charters.

SEC. 15. The Pacific Railroad Company shall immediately apply all the net earnings of the Southwest Branch, since the first day of July, 1861, and all the net earnings that may accrue, to the further construction of said Southwest Branch from Rolla to its western terminus, and shall, as speedily as possible, sell such lands as the said Southwest Branch may be entitled to out of the lands donated to the State of Missouri by the Congress of the United States, and shall also apply the proceeds of all such sales to the construction of said road from Rolla to its western terminus. The said Pacific Railroad Company shall complete the said Southwest Branch from Rolla to the mouth of Little Piney within fourteen months from the passage of this act.

SEC. 16. There is hereby reserved to each and every person who originally made, or who was the owner by purchase or otherwise, on the third day of March, 1855, of any improvement for agricultural purposes upon any railroad land along the line of the Southwest Branch Railroad, the right of pre-emption to one hundred and sixty acres of land, including the improvements made thereon, according to the several acts of the General Assembly in such cases made and provided; but this right of pre-emption shall not be construed to apply to any land of the company where there has been lead or ore dug, or known as mineral land, it being the intention to secure the right of purchase solely to agricultural lands; and every person who has or may hereafter establish his right of pre-emption according to this or any former act, shall pay at the rate of two dollars and fifty cents per acre for the land pre-empted.

SEC. 17. It shall be the duty of said Pacific Railroad Company, as fast as said Southwest Branch Railroad is completed, to cause a notice thereof to be given by advertisement in two St. Louis weekly newspapers and such newspapers as

shall be published along the line of the said Southwest Branch Railroad, and require the persons along the said completed line of road, and for twenty miles beyond, whose right to purchase the lands of said company is reserved by this act, to come forward and pay for the same; and all persons having such right of purchase, who shall fail to pay the purchase money for their lands within six months from the first publication of said notice, shall be held to have abandoned their right of purchase, and the same shall thenceforth become void.

SEC. 18. All acts and parts of acts inconsistent with this act are hereby repealed; and this act shall take effect and be in force from and after its passage.

Approved February 10, 1864.

AN ACT authorizing the county of St. Louis to issue bonds.

Be it enacted by the General Assembly of the State of Missouri, as follows:

§ 1. The county court of St. Louis county is hereby authorized to issue seven hundred county bonds of the denomination of one thousand dollars each, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, the principal and interest payable in the city of New York, and loan said bonds to the Pacific Railroad Company for the completion of said road; said bonds to be issued under such conditions as may be agreed upon between said county court and the board of directors of the Pacific Railroad Company, such conditions to be binding on the parties, but shall not impair or affect the validity of the bonds after they are issued.

§ 2. The Fund Commissioner of the Pacific Railroad, or such person as may at any time hereafter have the custody of the funds of said railroad company, shall, every month after said bonds are issued, pay into the county treasury of St. Louis county, out of the earnings of said Pacific Railroad, four thousand dollars, and one thousand dollars additional in each month of December, to meet the interest on the said seven hundred bonds; said payments to continue until said bonds are paid off by the Pacific Railroad.

This act to take effect and be in force from and after its passage.

Approved January 7, 1865.

AN ACT for the sale of the Pacific Railroad, and to foreclose the State's lien thereon, and to amend the charter thereof.

SECTION

1. Governor empowered to sell the Pacific Railroad; under what provisions.
2. Road not to be sold under eight millions of dollars; how to be conducted.
3. Gauge of road to be changed.
4. Governor to execute deed for road; when.
5. Present company may get a deed of release; under what conditions, and within what time.
6. State to assume St. Louis county loan and floating debt; when.
7. Duties of Governor in case of purchase by the State.
8. Board of Directors to be elected; their organization and duties; auditor's and treasurer's duties in regard to Dresden mortgage and St. Louis county bonds.
9. Governor to make publication for bids.
10. Conditions of bids for purchase.
11. Pacific Railroad subject to general railroad law.
12. Office of Fund Commissioner abolished in case of sale.
13. Purchasers to assume term of contract with the Boonville extension of Osage Valley and Southern Kansas Railroad Company.
14. South Pacific Railroad Company to have right to run trains between Franklin and St. Louis.
15. When to take effect.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. The Governor is hereby directed and required to sell the Pacific Railroad and its appurtenances, and all property belonging thereto, in accordance with the provisions of section 5 of this act and an act entitled "An act to expedite the construction of the Pacific Railroad and of the Hannibal and Joseph Railroad," approved February 22, 1851.

SEC. 2. Upon a sale of the road, as provided in the foregoing section, the price and sum for which the same shall be sold shall not be less than eight millions and three hundred and fifty thousand dollars, payable to the State treasurer, in bonds of this State or in money, within ninety days from the day of sale. No bid, except the bid of the Governor on behalf of the State, shall be accepted unless there is paid to the State treasurer, who shall attend said sale, an amount of not less than three hundred thousand dollars, in such bonds or money, as a part of the purchase money to be paid when the road is stricken off; and such bonds or money shall be forfeited to the State in case the purchaser

or purchasers shall fail to pay the amount of purchase money bid within the time above provided for. Such sale shall take place at the east front door of the court house, in the city of St. Louis, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon. If said sum of eight millions three hundred and fifty thousand dollars is not realized at such sale, the Governor of the State shall, by himself or agent, buy in the same for, and in the name of, the State of Missouri.

SEC. 3. The purchaser or purchasers of said road, under this act, shall bind himself or themselves to the State, and it is hereby made a condition of said sale, to change the gauge of said Pacific Railroad so as to conform to the gauge of the Union Pacific railroad, eastern division, within ten years from the date of sale.

SEC. 4. Upon the payment of all the purchase money, as specified in section 2 of this act, and upon the delivery of an obligation in conformity with section 3 of this act, the Governor shall execute a deed to the purchaser or purchasers, conveying all such right, title, and interest in and to said Pacific Railroad, its franchises, appurtenances, and the property belonging thereto, as are subject to the lien of this State.

SEC. 5. If the Pacific Railroad Company shall, at any time within ninety days after the first day of April, 1868, pay into the treasury of the State the sum of three hundred and fifty thousand dollars, in the bonds of this State, or in money, then, in that event, the Governor shall not advertise said road for sale; and if the said company shall, within ninety days thereafter, pay into the State Treasury an additional sum equal to five millions of dollars in all, (the same being either in cash or Missouri State bonds,) the Governor shall, upon the production of the receipts of the State treasurer for said amounts, execute and deliver to the said Pacific Railroad Company a deed of release for all claims, title, and interest which the State of Missouri has in and to the said Pacific Railroad, its property and appurtenances; and the said Pacific Railroad Company shall, from and after the delivery of said deed, be fully discharged from all claims or debts due to the State, and all liability growing out of the issue of the bonds of the State to aid in the construction of said road, and no sale shall, in that event, take place under this act. If, however, from any cause the said company

shall be unable to pay the additional sum as herein provided, the Governor shall proceed to advertise said road; but if the said company shall, during the pendency of said advertisement, pay into the State treasury the said additional sum, with interest thereon from the 1st day of October, 1868, at the rate of 6 per cent. per annum, then, and in that case, no sale of said road shall take place, and the Governor shall execute and deliver to the said Pacific Railroad Company the deed of conveyance and release provided for in this act, and the said Pacific Railroad Company shall be exempt from all the liabilities and obligations herein specified; but in case the said company shall, after the payment of three hundred and fifty thousand dollars above stated, fail to pay the additional sum specified, (being the remainder of the five millions,) then, and in that case, the sum first paid shall be forfeited to the State.

SEC. 6. In case of a sale of said road under the provisions of sections 1, 2, 3, and 4 of this act, the State of Missouri shall assume the payment of principal and interest due on seven hundred thousand dollars in bonds issued by the county of St. Louis as a loan to the Pacific Railroad Company, under the act of January 7, 1865, and also the floating debt of said company existing at the time of the passaage of this act, not to exceed the amount of six hundred and fifty thousand dollars.

SEC. 7. In case of a purchase by the Governor, in behalf of the State, as provided in section 2 of this act, he shall take possession of the said road, together with all property and appurtenances belonging thereto, and shall then turn the same over to the Board of Directors hereinafter provided for.

SEC. 8. There shall be elected, immediately after the passage and approval of this act, in joint session of the General Assembly, nine directors, one from each congressional district. Said directors shall, as soon as the Governor shall have taken possession of the road, choose one of their own number for president and one for treasurer, who shall each give bond in the sum of one hundred thousand dollars for the faithful performance of his duties, which bond shall be approved by the Governor and filed in the office of the secretary of state; and said president and Board of Directors shall thereupon have authority to operate said road, in the same manner and with like powers as the president and

directors of said Pacific Railroad Company are now by law authorized, until said road is otherwise disposed of, as hereinafter provided, and for that purpose may make all needful regulations. They shall make monthly reports, under the the oaths of at least three of their number, to the Governor, of all transactions connected with the operations of said road, and shall account for and pay over to the State treasurer all moneys that may come into their hands belonging to the State and derived from the net earnings of said road, taking duplicate receipts therefor, one of which shall be deposited in the office of the State auditor. The said auditor shall also draw his warrant on the State treasurer, upon the presentation of the proper coupons, of any interest then maturing on the Dresden mortgage bonds and St. Louis county bonds, above mentioned, for the amount of said coupons, which warrants shall be paid by the treasurer.

SEC. 9. Within thirty days after the road and the property belonging thereto shall have passed into the possession of the State, the Governor shall publish a notice in such paper as he may deem proper, inviting proposals or bids for the purchase or lease of the Pacific Railroad; and he shall receive such bids and proposals until ten days prior to the meeting of the twenty-fifth General Assembly, and within ten days after the meeting of such General Assembly he shall transmit the same, with a special message, to the said General Assembly for its action.

SEC. 10. All bids and proposals for the purchase of said road shall assume, first, the payment of principal and interest, due and to become due, on the one million five hundred thousand dollars, first mortgage bonds, issued under the act of February 10, 1864; second, the principal and interest due on the seven hundred thousand dollars bonds, issued by the county of St. Louis to the Pacific Railroad Company, under the act of January 7, 1865; third, the floating debt of said Pacific Railroad Company, existing at the time of the passage of this act, not to exceed the amount of six hundred and fifty thousand dollars; and all bids and proposals for leasing said road shall assume the payment of the floating debt of the said Pacific Railroad Company, existing at the time of the passage of this act, not to exceed the amount of six hundred and fifty thousand dollars. And all bids, whether for a purchase or lease of said road, shall be based upon a stipulation, on the part of the purchaser or lessee, to

change the gauge of said road to conform with the gauge of the Union Pacific Railroad, eastern division, within the period of two years from the date of sale or lease.

SEC. 11. The said railroad company shall be subject to the provisions of the general laws of the State now in force or hereafter to be enacted, classifying freights and fixing the regulations, rates and charges for the transportation of freights and passengers by the railroads in this State; provided, that the provisions of this section subjecting the Pacific Railroad to future legislation shall not take effect for ten years after the passage of this act.

SEC. 12. In case of sale, as prescribed in sections 2 and 5, the office of Fund Commissioner is hereby abolished, and all provisions of an act entitled "an act for the extension and completion of the Pacific Railroad to the western boundary of the State, at Kansas City, and the North Missouri Railroad to the Iowa line, to complete the Southwest branch of the Pacific Railroad, and to reduce the State indebtedness," approved February 10, 1864, applying to a Fund Commissioner, and prescribing his duties and powers, are hereby repealed.

SEC. 13. In the event of the sale of the Pacific Rail road, as provided in sections 1, 2, 3 and 4 of this act, the purchaser or purchasers thereof shall take the same, subject to the terms and conditions of a certain lease and contract made and entered into by and between the Pacific Railroad Company and the Boonville extension of the Osage Valley and the Southern Kansas Railroad Company, bearing date the 10th day of February, 1868, under which said lease and contract the Boonville extension of the Osage Valley and Southern Kansas Railroad Company have leased their road to the Pacific Railroad Company for the term of thirty years from the 15th of September, 1868; and the provisions of such lease and contract shall be and are hereby declared to be binding upon the purchaser or purchasers as aforesaid.

SEC. 14. The South Pacific Railroad Company, when organized, shall have the right to run their trains over the track of the Pacific Railroad, from Franklin to St. Louis and return, until the said South Pacific Railroad Company shall construct their road from Franklin to St. Louis, on such terms and for such compensation as the said companies shall agree upon, or, failing to agree, each of said companies

shall choose a competent railroad superintendent, who shall select a third, a majority of whom shall fix said terms; provided, such right and agreement shall not continue more than ten years after the passage of this act.

SEC. 15. This act to take effect from and after its passage.

Approved March 31, 1868.

IN SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1879. No. 162.

GEORGE E. KETCHUM et als., Appellants,

vs.

THE COUNTY OF ST. LOUIS, Intervenor, Respondent.

ORAL ARGUMENTS

FOR RESPONDENT,

By P. PHILLIPS and FRANK J. BOWMAN,

AND

REPLY OF HENRY A. CLOVER

TO QUESTIONS BY THE COURT.

WASHINGTON:
JUDD & DETWEILER, PRINTERS.
1880.

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 162.

GEO. E. KETCHUM ET AL.

vs.

COUNTY OF ST. LOUIS, INTERVENOR.

ORAL ARGUMENT OF MR. P. PHILLIPS.

JANUARY 21, 1880.

May it please your Honors: the amount involved in this case is a large one, and, of course, that gives interest to the cause; but the legal proposition in the case is a very small one, and is easily disposed of. There is some difficulty in establishing a state of facts to which the principle of law attaches, but when that is done the legal proposition involved in the question of equitable assignments is as plain and as well recognized as any doctrine that has ever received the adjudications of this Court. There is no controversy, or conflict of opinion, so far as the judgments of this Court are concerned, as to what will constitute an equitable assignment or trust that will be enforced.

In order to ascertain the facts to which we are to apply the law, we are to recur to what has occurred in the State of Missouri in reference to this transaction:

In 1849 the Legislature of Missouri incorporated this company to build a railroad from the city of St. Louis to the western boundary of the State, some 300 miles in extent; and to aid the road to acomplish this purpose, the State issued these bonds, which, in 1855, amounted to some $7,000,000, the State having an absolute lien upon the road, with the right of sale.

The CHIEF JUSTICE: That was a statutory mortgage?

Mr. PHILLIPS: Yes, sir.

In 1861, about 180 miles of this road had been completed.

In 1864 we come to the first material fact in this case. In that year the legislature, finding that this company was wholly in default, sequestered the property of the company, took it into its possession, and administered it under its officer designated as a Fund Commissioner, with directions that he should make certain payments.

The road being still unfinished in 1864 (the State having taken administration of the road) it was provided by that act that the company should be authorized to borrow $1,500,000 for the purpose of building the unfinished portion of the road, which was, I think, about 80 miles, to Kansas City, on the western boundary of the State. The bonds to be issued were called the Dresden Bonds, and to the extent of that 80 miles the State relinquished its first lien in favor of the Dresden Bonds, for the completion of the road, reserving a second lien, which second lien was again to become a first lien when those bonds had been satisfied.

The money was borrowed and expended, but during the civil war this road was raided by hostile forces, and was so injured and damaged as to render the appropriation of these Dresden Bonds wholly ineffectual for the purposes contemplated.

I desire to refer to the graphic description given of the

condition of things by Mr. Justice Miller, when a branch of this litigation was heretofore considered. He says:

"The railroad companies emerged from the war with their roads in a state of repair which hardly admitted of use, and the rolling-stock so deteriorated that new supplies were indispensable. Their credit was low; their means exhausted; their property apparently worth but little. They were unable to meet their obligations to the State, and were largely in arrears for interest on the State bonds. The State itself was in little better condition. To the heavy burden of increased taxation imposed by the Federal Government, was now added the necessity of paying interest on the large debt the State incurred in aid of the railroad companies."

Mark, that the State and the company were in this helpless condition in the year 1865, after the Dresden Bonds had been exhausted and failed to accomplish the object for which they were issued. It was then County of St. Louis was called upon to advance $700,000 of its bonds, for the purpose of accomplishing this great work.

I.

As a first step in this matter, I desire to call your Honors' attention more particularly to what has been referred to in the opening argument as the proceedings which took place in the county court, when the judges of that court were asked to make this loan to the company. There were two propositions submitted. This was one: (I read from pages 63 and 64 of the record.)

"Mr. Justice Fisse submitted the following for the action of the Court, viz:

"Whereas, the directors of the Pacific Railroad Company have submitted to the Court their memorial setting forth the condition of the company, as well as the injury done it by the recent rebel raid into our State by the destruction of so large a portion of its property, and praying

the Court to issue, under authority to be obtained, $700,000 St. Louis county bonds. * * * *

"It is ordered by the Court that they will not be adverse to issue St. Louis county bonds to the amount $700,000 in aid of completing the Pacific Railroad to Kansas city, if the following conditions are embodied in the law to be passed for that purpose:

"(1.) The county court to be authorized to issue $700,000 St. Louis county bonds in aid of the Pacific Railroad Company, the proceeds of which shall be used for no other purpose than completing the road to Kansas city. * * *

"(2.) The State to relinquish so much of the mortgage on the road as covers the rolling-stock, which shall then be mortgaged by the company to the County of St. Louis as security for the $700,000 bonds issued."

Notice that in this proposition, which was originally introduced, there is a direct requirement for security. The State, the holder of the whole lien upon the road and upon its property, was to relinquish it in favor of the county, to the extent of the loan to be made by the county.

In this first proposition there is this additional condition that a vote of the people of the county who were to pay this debt if default should be made, should be taken. That is left out in the second proposition, for, to take a vote would require time. Besides, there was the contingency as to the result of the vote.

Now we will see what this second proposition was:

"It is ordered, in view of the importance of the completion of this road to the tax-payers of this county, that this Court will concur in case application should be made by the Pacific Railroad [to the Legislature] in the propriety of the passage of the following act *securing* the completion of the road and the interest of the County of St. Louis in the issue of said bonds."

Now, what is the proper construction to be given to this resolution? The condition was the passage of an act securing to the county the completion of the road *and* the inter-

est of the county in these bonds. The county had undoubtedly two interests: It had an interest in the completion of the road as facilitating commerce and agriculture. This in a greater degree but of the same character any other county would have through which the road should pass. That interest was protected by the first section of this resolution, to wit, *the completion* of the road.

But it does not stop there. The act was also to secure the *interest of the county in the issue of said bonds.* What does that refer to? Not again to the completion of the road, because that has already been stated. It is coupled with a conjunction: "*and* the interest of the county." It is something else, therefore, than the interest in the completion of the road. What was intended by the parties who drew it—not with very great grammatical skill—not in the most appropriate manner possible to use—by adding the conjunction after "the completion of the road" *and* the interest of the county in the issue of these bonds? I say that it was intended to have security for the interest payable on the bonds.

Another fact I desire to call to the attention of the Court: The draft of the act which accompanied this resolution, upon which application to the legislature was made, recites that the *Fund Commissioner* of said Pacific Railroad shall monthly pay into the treasury in advance $4,000.

May it please your Honors, when this act was carried by the railroad company to the legislature to have it passed as drafted by the county court, the legislature at once saw that the object the county had was not secured by the terms which it had used, because they had merely said that the Fund Commissioner should make the monthly payments. The legislature knew that under the act of 1864, the office of Fund Commissioner would terminate in a certain event, viz., when the Dresden Bonds and State bonds were paid. Therefore, looking to this contingency, it inserted in the second section of this act, which is now the

subject of your construction, after the words "Fund Commissioner," these words: "or such person as may at any time hereafter have the custody of the funds of said Railroad Company."

Now, the act of 1865, thus amended, was duly accepted by the county, and the corporation (the Pacific Railroad) duly filed its acceptance of it with the Secretary of State.

Stopping just at this point of the case, what do we have? I would like to remind the Court as to who are the contestants here. On one side they are the County of St. Louis, claiming by virtue of a loan of $700,000 to this company to enable them to complete their road, and make this great work valuable to the company and to the State, on their side asserting that they had and have a right to claim this as a lien upon this road which they had so rendered valuable in 1865; and on the other side the contestant is one who, in 1875, (ten years after this transaction,) becomes interested as a mortgagee upon this property. These are the parties contesting before this Court.

When the company accepted this act, the effect of the issue of the bonds under it was to convert the provisions of the second section into a contract by which the company consented that the Fund Commissioner, who had the right to receive all its funds, "or any other person who should at any time thereafter have the custody of its funds," should every month pay out of the earnings of the road the specified sum necessary to meet the interest on the bonds, which payment, it was provided, should continue until the bonds were fully paid by the said road.

Here was a contract between the only parties in existence who had any interest—the State, the Railroad Company, and the County of St. Louis. No other person had a right to challenge this transaction, or was in any wise interested in disputing it. The company accepted it; the county accepted it; the State agreed to it; and what was it? The State having the lien, and the right to use the funds of the

company for the preservation of its lien, says to the County "if you will loan this $700,000 for the completion of this road, I will yield my lien to the extent of $4,000 per month in favor of the County."

Who else was interested? The railroad company; because, though the State was administering this property, it was the property of the railroad. Then the party, owner of the property subject to the administration of the State, comes in and says: "Your order upon the Fund Commissioner, or any other person who shall hereafter have the funds of this railroad company, to pay to the county this $49,000 per month, is a proper and good thing, and I consent to it." That is the transaction.

It was as though it had originated in an order from the corporation; as though the railroad corporation had said to the Legislature, "I want to borrow $700,000 from the county, and you will administer my funds; I will give an order upon the Fund Commissioner, or any body else who may hereafter come into possession of the funds of this road, if you will consent that $4,000 of the income of this property shall be paid monthly to this county." It is precisely the same whether it had originated with the railroad company, or with the State, the railroad company consenting; it makes no difference.

But, may it please your Honors, going a little more into this question of intent, to be found outside of the expression of the legislature itself, I must refer to what I consider a very important fact in this case as illustrating that intent, and that is a letter written by Mr. Leighton, the attorney of the Railroad Company, to Mr. George R. Taylor, the president of the Railroad Company, dated January 10, 1865, three days after the passage of the act of 1865, and laid before the County Court. I must read this letter, at a little risk of wearying the Court, because I conceive that it is important. It is addressed, as I said, to Mr. Taylor, president, and by him presented to the County Court three days

after the passage of the act, and, of course, prior to the execution of the act by the issuing of the bonds. He says:

"The Fund Commissioner is a public officer created by the act of February 10, 1864. His position and duties, as defined by that act, are, in general terms, those of a general trustee or receiver, holding, with the assent of the company, (as expressed by the acceptance of the act,) the earnings of the company upon certain express trusts, among which are paying expenses of operating, etc., the road, paying interest and principal of loan under that act, and paying interest upon and purchasing State bonds. It is in the last of these only that the State, as *cestui que trust*, under the relations so established, has an interest which could be affected by legislation.

"The first section of the present act authorizes the County Court to loan, etc., under such conditions as may be agreed upon.

"Although not mentioned in express terms, the act presupposes, or rather anticipates, an agreement to the effect that the money for the payment of interest upon these bonds shall be furnished the county out of the earnings of the company.

"But as such an agreement could not be carried into effect—for under the act of February 10, 1864, such earnings are not within the control of the company, but are in the hands of the Fund Commissioner (as trustee) for the benefit of the State as a *cestui que trust*—the second section is enacted for the purpose of giving effect to such agreement, and makes it the duty of the Fund Commisssioner to pay out of the earnings of the road certain sums monthly.

"If the act should be accepted by the company, and the County Court should make the loan authorized, the act would be binding upon all the parties in favor of the County Court, to wit, the Company, the Funding Commissioner, and the State; neither could object to its execution.

"An agreement executed by the company, expressing its assent to such appropriation of the earnings of the road, would then, in my opinion, create in favor of the county an equitable lien or charge upon the earnings *pro tanto*.

"The direct authorization of such an appropriation of the earnings, or rather the direction to the Fund Commissioner (the trustee) to pay this monthly appropriation out of funds

to the benefit of which it (the State) is entitled, is unquestionably, in my opinion, a waiver or postponement of the interest of the State, as *cestui que trust* in favor of the county to the extent and for the purposes specified in the act.

"The act admits of no other construction. The first section of the act which authorizes the loan is enacted by the State purely in its legislative capacity.

"The second is in effect a partial release of its interest, for the State can have no legal control over this fund except as a *cestui que trust* under the relations heretofore established, and then only over its interest. In this respect it occupies no higher relation than an individual would holding the same claims.

"By directing, therefore, with the assent of the company, a different appropriation of the funds, to which it was before the passage of the act entitled, it postpones or waives its own claim to that extent in favor of the party authorized by this act to receive, viz., the County of St. Louis.

"The claim of the county upon the earnings of the road under this act could be easily enforced. The Fund Commissioner is a public officer, and where his duty is well defined, and, as under the second section of this act, purely ministerial, he may, in case of a failure to pay over the amount monthly, as directed by the act, be proceeded against by mandamus, and compelled to perform the duty enjoined upon him by law." (Record, p. 39.)

This letter was presented to the county judges prior to their action under the act of 1865, as the Master finds, evidently with the purpose of influencing their action. Placed there by whom? By Mr. Taylor, the president of the corporation to be bound by the lien. What motive could have induced Mr. Taylor, the president, to have sought that opinion from the attorney of the corporation, and to have presented it to the board before it acted? What other motive is it possible to assign to this transaction than that it was intended to say to them, "If there is any doubt about the construction of this act don't hesitate to make the loan which we apply for, for I, as the representative of this corporation, here present you the legal opinion of the attorney

of that corporation that there is no other construction to be placed upon the act of 1865, than that it gives to you a perfect security for your loan.

May it please your Honors, this letter was made a part of the intervening petition prior to the time when the case was referred to the Master to make a report upon all the facts in the case. The parties, therefore, knew of the existence of that letter, and as to the necessary use that would be made of it in the discussion as to the intention of the parties to this contract. They went before the Master. There other testimony was adduced. Where were Mr. Taylor and Mr. Leighton? If there was any explanation to be given in reference to this letter which could at all take away from it the influence which it would necessarily have upon any who were called upon to pass upon this question, why were not Mr. Taylor and Mr. Leighton present before the Master? They were, gentlemen, living then and living now in St. Louis, where this reference was had. The reason to be found is that no explanation could be made.

To offset this letter of Mr. Leighton, as showing what was the intention of the County Court when they entered into this contract of loan, they produced a letter, which was also found in the same archives, in which Mr. Clover, at that time the attorney of the county, is called upon to give his opinion on this question: "Does this act secure the County of St. Louis, beyond all contingencies, a lien upon this property?" He answers: "It does not, beyond all contingencies." The question which he considered in that letter was the right of the State in reference to these Dresden bonds, amounting to $1,500,000, then outstanding, to lessen the security given by act of 1864.

But take this latter letter in any light you please. Suppose they were both before the County Court when it acted. I say it had the right to act upon the opinion given by that party who was to be bound by the lien, and in the making of the

loan they would be fully justified in relying upon that opinion, the opinion of their attorney to the contrary.

I said, in the opening, there is no difficulty whatever in the law of the case. The difficulty is in arraying the facts. Therefore, I have taken up, I am afraid, a great deal more time than I ought to have occupied in going over facts in the history of this case, so as to now make the application of the law.

II.

What is the proposition? It is this:

That if a debtor, by a concluded agreement with a creditor, sets apart a specific amount of a specific fund in the hands, or to come into the hands, of another from a designated source, and directs that such person should pay it over to the creditor, which he assumes to do, this is a specific appropriation binding upon the parties and upon all persons with notice, who subsequently claim an interest in the fund under the debtor.

That is the legal proposition upon which this case must be determined. I say this proposition is well settled. I shall not fatigue you by reading cases, but I will use extracts and brief sentences, which bear upon this question. It is singular that several cases to which I shall refer for the doctrines I maintain, are relied on by the other side to show that the doctrine does not exist.

The first case I refer to is Spain *vs.* Hamilton, administrator, 1 Wall., 624:

"To constitute an assignment of a debt or other chose in action, in equity, no particular form is necessary. A draft drawn by A or B, in favor of C, for a valuable consideration, amounts to a valid assignment to C of so much of the funds of A in the hands of B. Any order, writing, or act which makes an appropriation of a fund, amounts to an

equitable assignment of the fund. The reason is, that the fund being a matter not assignable at law, nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity."

General Hamilton had in the Treasury of the United States $100,000, the Bank of the United States had paid him for procuring the Government of the United States to assume the Texan bonds; and had given different orders to various parties upon that fund in the treasury.

Mr. Justice BRADLEY.—The fund being in existence at the time.

Mr. PHILLIPS.—Yes, sir.

Mr. Justice FIELD.—Were the orders accepted?

Mr. PHILLIPS.—No, sir. The fund was in the treasury, and of course the treasury would not accept any orders.

The next case is Christmas *vs.* Russell, 14 Wallace, 84, where the agreement was held not to amount to an assignment. This opinion was delivered by Mr. Justice Swayne, and thus opens:

"An *agreement* to pay out of a particular fund, however clear in its terms, is not an equitable assignment."

The learned gentleman who opened the case has been misled by not distinguishing our case from those which rest on a mere agreement to make an assignment.

In this case of Christmas *vs.* Russell, Mr. Nugent, of Mississippi, had become bail upon an appeal bond for Christmas, who during the troubles of the war was in Europe. Nugent wrote to Christmas to make him secure upon that appeal bond. Christmas replied by certain letters, in which he promises that he will make him secure, and that he will devote to that purpose the proceeds of a certain note which he owned. That was the case. The question was, whether that was an assignment—Mr. Nugent contending that it was an assignment of a specific thing.

The Court said, it is nothing more than a promise to do the thing, and that no property passed, holding that—

"An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect."

"The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund, any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund holder can safely pay, and is compelled to do so, though forbidden by the assignor."

In this case the State had said to the County, "loan this railroad $700,000, and I yield to you my lien to the extent of $4,000 per month." The State could not recall that, without violating the obligation of good faith.

The gentlemen says that a mandamus would not lie to compel payment by the Fund Commissioner; I think it would. There may be difficulty in some cases. This case is unlike that of Christmas; here there is no power of revocation, but an absolute transfer of interest in a thing, viz.: the earnings of the road, which the party owner of the earnings consented should be made.

I have stated the doctrine as defined by this Court. How is the doctrine stated in other courts of the highest ability? In the case of Pinch *vs.* Anthony, 8 Allen, the Court said:

"The rule is perfectly well established that a party may by express agreement create a charge or claim in the nature of a lien on real as well as on personal estate of which he is the owner or possessor, and that equity will establish and enforce such charge or claim not only against the party who stipulated to give it, but also against third persons who are either volunteers or who take the estate on which the lien is given with notice of the stipulation. Such an agreement raises a trust which binds the estate to which it relates,

and all who take the title, thereto with notice of such trust, can be compelled in equity to fulfill it."

Paragraph 1231, of 2 Story's Equity Jurisprudence, says:

"Liens may be created on the purchase money due on the sale of an estate, in favor of a vendee, if it is agreed that the money shall be deposited in the hands of a third person, to be applied in discharge of prior encumbrances, to the extent of such encumbrances. Indeed, there is generally no difficulty in equity in establishing a lien, not only on real estate but on personal property, or on money in the hands of a third person, whereever that is a matter of agreement, at least against the party himself, and third persons, who are volunteers, or have notice. For it is a general principle in equity, that, as against the party himself, and any claiming under him, voluntarily, or with notice, such an agreement raises a trust."

In speaking of the want of a common law jurisdiction in the assignment of choses in action, Mr. Story, at paragraph 1840 *ib.*, says:

"But courts of equity have long since totally disregarded this nicety. They accordingly give effect to assignments of trusts, and possibilities of trusts, and contingent interests, and expectancies, whether they are in real or personal estate, as well as to assignments of *choses in action*. Every such assignment is considered in equity, as in its nature amounting to a delaration of trust and to an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt, or to reduce the property into possession. Contingent rights and interests are not ordinarily assignable at law; and yet they may sometimes be assigned at law if coupled with some present interest. So at law such rights and interests may pass by way of estoppel, by lease and release, or by fine. But the reach of this doctrine at law falls far short of that now entertained in equity. To make an assignment valid at law the thing which is the subject of it must have actual or potential existence at the time of the grant or assignment. But courts of equity will support assignments, not only of *choses in ac-*

tion, and of contingent interests and expectancies, but also of things which have no present, actual or potential existence, but rest in mere possibility; not, indeed, as a present positive transfer operative *in presenti*, for that can only be of a thing *in esse*, but as a present contract to take effect and attach as soon as the thing comes *in esse*."

In all of these authorities, the case of Legard *vs.* Hodges, in 1 Vesey, Jr., is cited for this doctrine, and here is a brief statement by the chancellor:

"I take this to be a universal maxim: that wherever persons agree concerning any particular subject, that in a court of equity, as against the party himself, and any claiming under him voluntarily, or with notice, raised a trust. These persons have so claimed; and therefore this a pure trust estate," and they must be declared trustees. (1 Vesey, Jr., 478.)

I now merely refer to the late works of Jones on Mortgages and on Railroad Securities, for a short extract upon this subject. If I may be permitted, I wish to say that these books entitle their author to the thanks of the profession. In chapter 5, p. 119, of "Jones on Mortgages," he says:

"In addition to these formal instruments which are properly entitled to the desigation of mortgages, deeds and contracts, which are wanting in one or both of these characteristics of a common law mortgage, are often used by parties for the purpose of pledging real property, or some interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Equity comes to the aid of the parties in such cases, and gives effect to their intentions. Mortgages of this kind are therefore called equitable mortgages."

Mr. Jones, in his work on railroad securities, at page 57, in speaking specifically as to this character of corporations, says:

"An agreement of a company to set apart specific earn-

ings or property in the hands of a third person to meet the interest or principal of its bonds, creates an equitable lien or charge."

"This legal proposition, which is an accepted doctrine of courts of equity, is tersely stated by Judge Dillon."

Mr. Phillips.—No, sir; but he says that this is accepted doctrine.

Mr. Justice Field.—He does not give any cases?

Mr. Phillips.—I believe not. But this opinion of Judge Dillon is in exact accord with all the decisions in this Court as to what constitutes an equitable assignment, and there is no authority to be found which controverts it.

An order to pay a debt out of a particular fund constitutes an equitable assignment, lien, or trust.

The authorities cited on the other side have no sort of bearing upon this proposition.

Hunt *vs.* Rousmanier, 5 Cond., 408,
Webb *vs.* Walker, 7 Cush., 50,
Rodger *vs.* Hosach, 18 Wend., 320,

are cited as in conflict with it.

A very brief examination will show that they are in entire harmony with all the decisions relied on by us.

In the two first the question arose on a power of attorney. In Hunt's case the opinion opens with the statement that the "instrument contains no word of conveyance." If, say the court, the word "interest" indicated a title to the *proceeds of sale*, and not a title to the thing to be sold, then the power to sell for his own benefit would be a power coupled with an interest. Such a power would survive the person giving it and would be executed after his death.

But, on the power in question, the court held that it was a mere naked power not coupled with an interest, and

though irrevocable by Rousmanier himself, expired on his death.

So in the case of Webb *vs.* Walker, it is said the instrument "only gives a power to sell and apply the proceeds. This is not a power coupled with an interest and amounting to an assignment." But, say the court, "when the party has conveyed an interest in the thing itself with a power to sell and appropriate the proceeds, the grantee takes something more than a naked revocable power."

The case of Hunt *vs.* Rousmanier, is cited as sustaining the decision.

In Rogers *vs.* Hosack, Gracie & Sons assigned, for benefit of creditors, a claim against the *British Government*, with a covenant by A. Gracie, that if this should be insufficient, "the deficiency should be paid out of any moneys received by *him*, his executors, &c., from the *French Government*, as soon as the same shall be received by him."

After A. Gracie's death the French Government agreed to pay $ to his executors. Thereupon a creditor filed his bill to enjoin the executor from receiving the same.

COWEN, J., held: "Here is no assignment, no mortgage, or pledge, no order, or any other specific appropriation of the French funds, but a *mere covenant* to pay them over on their being obtained by the covenantor."

Such an agreement does not create a lien either at law or in equity. (335.)

DICKINSON, J., fully approves the decision in Bradley *vs.* Root, 5 Paige, 641, and cites Yates *vs.* Groves, 1 Vesey, Jr., and other cases, as fully establishing that an order to pay a debt out of a particular fund constituted an equitable assignment and gave to the creditor a specific lien. Indeed, (says the judge,) this is established, as to orders, beyond controversy. But it requires little discrimination to discover the difference between an order which, both in terms

and legal effect contains an assignment, or the elements of one—being a direction to one to pay or deliver, with power to the other to receive and appropriate; *and a simple, naked covenant or agreement* to pay out of a particular fund, unaccompanied by any words of transfer, or any power or authority whatever in the premises.

It is thus shown there is no contrariety in these cases; and I repeat, that all the difficulty we have is to ascertain what are the facts; but as to the law to be applied to the facts, there is, in my opinion, no difficulty whatever.

III.

Now we come to another question—the estoppel that is set up against this municipal corporation. What is an estoppel? What are the principles of estoppel if they are applicable at all to the case in hand? In 18 Wall., 271, the Court gives this definition:

"An estoppel *in pais* is sometimes said to be a moral question. Certain it is, that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his conduct which has misled others to their injury. Conduct or declarations founded upon ignorance of one's rights have no such ingredient, and seldom work any such result. There are cases, it is true, where declarations may be made under such peculiar circumstances that the party will be estopped from denying any knowledge of his rights; but these are exceptional, and do not affect the correctness of the general rule, as stated."

Again: in 93 U. S., 335, in the case of Brent *vs.* Virginia Coal and Iron Company *et al.*:

"It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such

gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. 'In all this class of cases,' says Story, 'the doctrine proceeds upon the ground of constructive fraud or of gross negligence which in effect implies fraud. And therefore when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only: that there must be positive fraud or concealment or negligence, so gross as to amount to constructive fraud.'" (1 Story's Eq., 391.)

I must go very rapidly through this matter, merely pausing to say that, to sustain the estoppel, they aver that the company made a financial statement in which they said the county of St. Louis had no lien. What is that to us?

They say on another occasion you filed a proceeding in bankruptcy in which you asserted that you were an unsecured creditor to a certain amount. That is true. That proceeding was never carried into effect, but was dismissed by the counsel who commenced the proceeding before any action taken by the court.

In estimating the weight of this as an admission, we must remember that it was made ten years after the agreement of loan was made, and that none of those who represented the county at that time were in office when these proceedings were instituted.

Beyond this is the fact that they were instituted four months *subsequent* to the execution of the third mortgage now in controversy, and, therefore, could have had no influence upon its execution.

IV.

I come now to the question of notice.

I assert that this act of 1865 is a public act. Look at all of its elements. It conferred an important power upon a pub-

lic political corporation, viz., the power to subscribe $700,000, and that without the vote of the taxpayers of the county.

Again, it was for a public purpose of great interest to the State and all its inhabitants.

Again, it charged a public officer, holding the road for the benefit of the State, as to how to dispose of its revenues.

Such an act as this, may it please your Honors, this Court would take judicial notice of without proof, and all persons are bound by notice of its contents.

But again: This act of 1865 is recited three times in the the act of 1868, which they admit to be a public act. It presents three contingencies, referring to this demand of the county under the act of 1865.

What is a public act, and where are the limits by which you are to accurately define it? In 1st Kent's Com., 498, he says:

"There is a material distinction between public and private statutes, and the books abound with cases explaining this distinction in its application to particular statutes. It is sometimes difficult to draw the line between a public and a private act, for statutes frequently relate to matters and things that are partly public and partly private. The most comprehensive, if not the most precise definition in the English books, is that public acts relate to the kingdom at large, and private acts concern the particular interest or benefit of certain individuals or of particular classes of men. Generally speaking, statutes are public; and a private statute may rather be considered an exception to a general rule. It operates upon a particular thing or private persons."

In Sedgwick on the Construction of Statutory and Constitutional Law, page 25, after speaking of public and private acts, he says:

"In this country [*i. e.* the United States] the disposition has been, on the whole, to enlarge the limits of the class of public acts, and to bring within it all enactments of a general character, or which in any way affect the community at

large. The subject has been considered, as we shall hereafter see, with reference to the provisions of the Federal Constitution; and it has been held that the establishment of towns and counties and their boundaries, court-houses, jails, bridges and ferries, are all matters of public policy, and acts relating to them are of course public acts. * * * So, in Massachusetts, acts creating public corporations, whether sole or aggregate, are public statutes. Acts, too, which although affecting only a particular locality, apply to all persons, are public acts. So an act passed for the survey of timber in the county of Penobscot, in the State of Maine, and an act relating to the preservation of a particular fish in the Dunstan river, in Massachusetts, were each held public acts."

I have looked with some little diligence into the reports of this Court, but I do not find that this question has ever been thoroughly discussed or considered. But in 4 Cranch, in the case of Young *vs.* Bank of Alexandria, the Court held that the incorporation of the Bank of Alexandria was a public act; and in Griffin *vs.* Gill, 2 Black, an opinion delivered, I think, by Mr. Justice Field, in 1862, it was said that if the pleadings in that case had permitted it the Court would have taken judicial notice of the acts of California relating to the harbor of San Francisco, and particularly the Water-Lot act of 1821.

V.

The last matter referred to in the elaborate presentation of this case in the opening argument, and which I consider I am bound to follow, is the question of mortgage.

I submit that it would seem to be an undoubted proposition that the owner of property may make such disposition of it, or its proceeds in rents and earnings, present or future, as he may think proper, with the single limitation that such disposition is not in derogation of law; and that this really is as applicable to corporations as to individuals. In 2

Story Reports, 630, I read from the head note of the case of Mitchell *vs.* Winslow:

"To make a grant or assignment valid at law, the thing, which is the subject of it, must have an existence, actual or potential, at the time of such grant or assignment. A mere possibility is not assignable.

"But courts of equity support assignments, not only of *choses in action*, but of contingent interests and expectations, and also of things which have no present actual potential existence, but rest in mere possibility only."

Equity follows the doctrine of the civil law: *Quod emptionem venditionem que recipit, etiam pignorationem recipere potest.* Therefore, rights in remainder and reversion, possibilities coupled with an interest, rents, franchise and choses in action, are capable of being mortgaged.

2 Story's Eq., § 1021.

The CHIEF JUSTICE.—I suppose there is no doubt about that question, if there is power given to mortgage?

Mr. PHILLIPS.—I will just read one more case to complete this. In 23 Howard, 128, in the case of Pennock *et al. vs.* California, this Court say:

"We have no occasion, therefore, of calling in question, much less denying the soundness of the maxim so strongly urged against the effect of the mortgage upon the property in question, as its force and operation depend upon a different state of facts, and to which different principles are applicable. The inquiry here is not whether a person can grant, *in præsenti*, property not belonging to him and not in existence, but whether the law will permit the grant or conveyance to take effect upon the property when it is brought into existence and belongs to the grantor, in fulfillment of an express agreement founded on a good and valuable consideration."

It is hardly necessary to add that this question cannot arise here because there is a special act of legislation. That cannot be against law which the law authorizes.

May it please your Honors: I have gone over all I desire to say. I think the principles for which I contend are the principles which must lead to the affirmance of this decree. They are:

1. That the act of 1865 and the action of the County, Company, and State created a lien in favor of the County.

2. That the appellants had notice of it and are bound by it.

3. That nothing is shown in the record which estops the County from asserting it.

On these three propositions I submit this case with the greatest confidence that the judgment rendered by Judge Dillon ought to be affirmed.

ORAL ARGUMENT

OF

MR. FRANK J. BOWMAN,

THURSDAY, *January* 22, 1880.

REVISED AND CORRECTED.

IF THE COURT PLEASE:

Called upon to conclude an argument which has been so ably commenced by my associate counsel, I shall proceed at once, without preliminary remarks, to the consideration of that which seems to me to be the only question remaining open to discussion.

That question is this:

Was the lien given to St. Louis county by the act of 1865, of such a nature that it continued after the time when the Pacific Railroad Corporation ceased to be interested in the property of the road?

I apprehend that that is the only question in regard to which there can be a fair difference of opinion.

In order to clearly understand whether the lien claimed is of such a nature as to continue upon the property of the Pacific Railroad, after the first owner had ceased to be interested therein, it becomes necessary that we should carefully consider the prior and preliminary questions, viz:

What was it that the lien attached to? What was the nature of the lien given?

By reaching a proper solution of these questions, we shall

be able to determine as to the extent and duration of the lien.

I must say frankly to the Court that I take the view that there is not here involved a question of the "*construction of conflicting decisions*," but simply a question of the proper construction of the statute of the State of Missouri creating the lien.

This lien, we claim, is a statutory lien, created by the act of the Legislature of Missouri.

Clearly, the State of Missouri had the power to create such a lien. Did it create such a lien? Was it the intention of the Legislature to create such a lien as would continue, not only while the Pacific Railroad was interested in the property, but continue until the debt created under the act was paid? We contend that such was the intention of the Legislature of Missouri. We contend that apt words have been used in this act for that purpose.

If such a lien was given, and no act has been done or consented to by the county of St. Louis, to invalidate such statutory lien, given as an inducement for thus making the loan, then it follows that the lien is still in force, and should be made effectual by an affirmance of the decree of the circuit court. It becomes, therefore, only necessary in the consideration of this case, to inquire as to the true construction to be given to the act of January 7, 1865.

The surrounding circumstances under which this act was passed are proper subjects of consideration in order to determine the intention of the Legislature; for it is *the intention of the Legislature* that this Court will desire to inquire into, and by its decree, carry into effect.

The intent of the Legislature, I may pause here to remark, was the intent of the parties themselves who consented to and accepted the act.

Pursuing the line of argument here suggested in this connection, I invite attention to the second section of the act of 1865. I will read it:

"The Fund Commissioner of the Pacific Railroad, *or such person as may at any time thereafter have the custody of the funds of said Railroad Company*, shall every month, after said bonds are issued, pay into the county treasury of St. Louis county, out of the earnings of said Pacific Railroad, $4,000, and $1,000 additional in each month of December, to meet the interest on the said seven hundred bonds; *said payment to continue until said bonds are paid off by the Pacific Railroad.*"

What fund was it that was here set aside and given to the County of St. Louis, to the amount here specified? What was the nature of the fund that was thus set apart to the County of St. Louis?

I was much surprised at the remarkable position taken by the counsel for appellants, Mr. Day, in contending that there was doubt as to what funds were thus set apart to the use of the County. There is no possible doubt. If we turn to the act of 1864, which created the office of Fund Commissioner, and seek there to be intelligently informed as to what fund it was, against which this charge was created, we find it clearly defined in the third section of that act, which I have set forth in my printed brief, and which is also referred to on page 5 of Mr. Broadhead's brief. The language of that act is as follows:

"*The gross earnings of said road from all sources, shall be paid in daily to said Fund Commissioner.*"

This is very comprehensive language, but this is not all; for after thus referring to the income of the road, and the daily payment to the Fund Commissioner of all gross earnings; the act continues as follows:

"*And all other sources of revenue belonging to or connected with said railroad shall be under his control and be taken into his possession, as they arise.*"

The kind and nature of the fund on to which we are claiming a statutory lien, given by the authority of the State of Missouri is thus clearly defined.

It was not only all "*gross earnings of said road*," but it was *all funds* from *all sources connected with* this railroad property, it extended to all the property owned by the Pacific Railroad, so long as it remaiued *connected with the road.* If disconnected with the use of the property, it would then, and not till then, be discharged from the lien we claim.

I admit that there is one way in which the lien of the County could be defeated; but there is but one way in which it could be done, and that is by ceasing to operate or use the franchise privileges, and properties upon which the lien was given; and by ceasing to use that franchise, by ceasing to use that valuable right of way, 200 feet in width, extending from the eastern boundary of the State at St. Louis, to the western boundary at Kansas City; by ceasing to use this railroad property the income would be destroyed, and the County's lien claim would then become valueless. The term "Pacific Railroad" has a double meaning, or signification. It may be used in referring simply to the *corporation*; and it may be, and more commonly is used in distinguishing the *property* of the corporation.

It is marked upon its cars, stamped upon its tickets, and used to designate its property, as apt, and comprehensive words of description.

It is apparent that the Legislature, in the act of 1865, in the expression, "earnings of said Pacific Railroad," used those words as referring to and including all that was owned and possessed by that corporation, and as embracing everything that appertained to it as a railroad company.

This is the more apparent when the comprehensive terms of the act of 1864, creating this fund in the hands of the Fund Commissioner, are referred to, as furnishing a definition of the fund, and the sources from which it was to be derived.

Mr. Justice STRONG.—If your view is correct, would not the lien have a priority over the running expenses of the road? Suppose the running expenses of the road exhausted

the whole of the gross earnings and income, as they might well do, could it have been applied to the payment of these expenses; or, under your view, would it have been applied to the payment of this interest on the $700,000?

Mr. BOWMAN.—It is to that view that I next desire to address my argument.

I will read the section of the act of 1864 making provision for the operating expenses, and then will point out definitely and define the extent to which we claim this lien attaches to the funds and properties then owned by the the Pacific Railroad.

Mr. Justice STRONG.—I understand you to say that what was meant by the earnings in the act of 1865 was defined in the previous act of 1864?

Mr. BOWMAN.—Yes, sir.

Mr. Justice STRONG.—The act of 1864 speaks of gross earnings.

Mr. BOWMAN.—It does; and this lien attached to the gross earnings, as will be observed by my reference to the act of 1864; but this lien upon the *gross earnings was not a first lien*, but really a third lien. The act of 1864 provides specifically that the *operating expenses shall be first paid by the Fund Commissioner*. Therefore, we say that the *operating expenses are a first lien* as against that fund. They must be paid first. The Legislature so declared, and for obvious reasons.

By the provisions of the act of 1864, the proceeds of the Dresden bonds were placed in the hands of the Fund Commissioner; he was to sell the bonds, and use the proceeds in constructing the road.

And in the fourth section of the act it is provided that—

"Said Fund Commissioner shall, out of all *moneys arising from the sale of bonds*, as aforesaid, upon proper vouchers, *pay for the construction of* the extension and equipment of

said road, as aforesaid; *and out of all other moneys derived from other sources, as before designated,* in his hands and under his control, upon proper vouchers and receipts, *he shall pay for the operating of the road.*" (Sec. 4, Act of 1864.)

In my view of the case this provision created a *first* charge or lien against the *gross income* "from all sources," to pay the operating expenses, and very properly so. The road must be operated in order to have any income, and therefore these expenses were very properly given a priority.

The seventh section of the act of 1864 provides that from the NET *earnings* remaining after paying operating expenses, the Fund Commissioner shall make payment of his own salary. The remaining portion of the fund was then to be applied as directed in the first section of the act, which contained the following provision: "*All the net profits of the road shall be applied to the extension and equipment thereof until completed, as aforesaid;*" reserving, however, sufficient for the payment of the interest accruing semi-annually on the "Dresden bonds."

Your Honors will now see the exact state of affairs at the time this act of 1865 was passed. The road had become largely and hopelessly indebted to the State, to such an extent that the State could not expect to receive repayment of its bonds, or by a sale realize a sufficient sum to satisfy its claim. An arrangement was therefore made by which the road was put in charge of a State officer, (the Fund Commissioner,) and at was arranged that all the gross earnings of the road, as daily received, or such as should originate from any source whatsoever *connected with the road*, were to be then taken possession of by the Fund Commissioner. Those funds were to be used:

First, to pay the operating expenses of the road; *second*, the salary of the Fund Commissioner; and the *third* use of the income was to pay the semi-annual interest on the

"Dresden bonds" and complete the construction of the road. He was then to proceed to apply any surplus that should remain in payment of the debt of the State.

Under these circumstances the act of 1865 was passed, by which the State consented that a portion of its own claim might be conveyed to the County of St. Louis. For what? As interest on $700,000 of mortgage bonds. To be used for what purpose? *For the completion of the road*—the very purpose that had been provided for in the act of 1865 (and here is the equity of the case)—the very purpose that, even as against the holders of the "Dresden bonds," the Fund Commissioner had the right to apply the proceeds; for the Dresden bonds were not to be paid *until the road was completed.*

It was thought advisable to obtain immediate aid from the County of St. Louis for that completion. That the loan was clearly made for the purpose of the *completion of the road* and for no other purpose, fully appears from the record.

The application made by the Pacific Railroad to the County Court of St. Louis County, December 23, 1864, was as follows:

"At a late meeting of the Board of Directors of the Pacific Railroad, the undersigned were appointed a committee to confer with your honorable body in relation to the present condition and prospects of the Pacific Railroad, and to ask the aid of the County *in completing this great work.*" (Page 62 of record.)

The records of the County Court of December 29, 1864, show the following:

"The court this day takes up the application of the Pacific Railroad for the issue of $700,000 of St. Louis bonds *to aid in the completion of said road.*" (Record, page 63.)

The bill of complaint in the case of Murdock & Clark *vs.* Woodson, duly sworn to was offered in evidence in this case. (The case is reported in 22 Wallace, 351.) The bill of com-

plaint in that case sets forth that the road was built and that the lien of the County of St. Louis proved insufficient to pay for such extension, repairs and equipments as were rendered necessary. (See Master's report, Record p. 76.)

It clearly appears in evidence, and there is no dispute that the road borrowed this money from St. Louis County for the completion of the road, and for no other purpose. It clearly appears from the evidence that it did not borrow any larger sum than was necessary *for the completion of the road.* It is apparent by reference to the act of 1864, that the State and the Pacific Railroad Company had the right to agree that the earnings of the road should be used for this purpose.

Reference to these material facts, which appear in the public acts of the State of Missouri, render easy of solution all questions as to the nature of the lien given the County, they show upon what property the lien was to attach, and make clear the intent of the Legislature in passing the act of 1865.

The view of this case which I am endeavoring to present is the same as was entertained by Judge Dillon, in his very able opinion delivered upon overruling the demurrer in ths court below. In that opinion he says:

"*It is not necessary to go into the general learning on the subject of equitable liens or charges, since the rights of the parties in the case before us essentially depend upon the construction of the act of* 1865.

"But the accepted doctrine of courts of equity in respect to equitable liens or charges will be found, we think, to support the conclusion we have reached. The cases clearly establish this legal proposition."

I do not deem it necessary to discuss in this argument, or refer to, the authorities which have been cited. I do not apprehend this Court will find that they have any application to the questions presented by the record.

The main question is whether this lien, which was *created by the authority of the State*, was of such an extent and nature

as to extend to the *income derived from the property* then owned by the corporation whose corporate name and *property* were *both* then designated and *described* as the "Pacific Railroad." This term being used as frequently to *describe* the *property* as to *designate* the *corporation*. Separated from the property there was no real value attaching to the Corporation. Can it be the Legislature of Missouri intended anything so farcical as a lien upon a naked corporate existence? We contend not; and if this construction is found by this Court to be the true construction of the act of 1865 there is no necessity for considering the propositions which were here presented and contended for yesterday by appellant's counsel or to examine the authorities claimed to support those views.

I am willing, for the purposes of this case, to concede, in answer to Mr. Day's proposition, that if a locomotive was sold, and thereafter ceased to be used upon the road, this lien would not attach. Why? Because it would cease to be "*connected with the road*," and the act of 1864 defined the fund upon which the County's lien was, by the act of 1865, to be the income derived from everything *connected with the road*. If a thousand tons of old rails were disposed of, the lien would not follow them, because they would *cease to be connected with the road*.

The Legislature evidently thought that it sufficiently protected the County of St. Louis, when it made it the duty of the Fund Commissioner in the first instance, and further imposed a statutory obligation upon whomsoever thereafter might have this fund—derived from operating the road, and from all sources connected therewith—to make perpetual payment to the County, of its interest, until its loan in aid of the road's construction was repaid.

It is not denied that the State of Missouri had the power through its Legislature, with the expressed assent of the Company, to direct such a disposition of the funds derived from the use of the properties of the Pacific Railroad, as

we contend were made. The State had power to declare by legislation that a certain sum should be paid annually by the Pacific Railroad for taxes, in lieu of any other assessments, unless it might be objected to on the ground of inequality. Let us then suppose, for the sake of the argument, that an act of the Legislature had declared that in lieu of all other taxes, a certain sum should be paid perpetually by the Pacific Railroad, and use the name or description here used, would it be contended because the management of that property was changed from its original possession and ownership to a successor, that thereby it became relieved from the tax imposed? Surely not.

The same quality of lien, that the State had in 1864 secured to itself, was, by the act of 1865, given to the County of St. Louis upon everything connected with or appertaining to the property known as the Pacific Railroad. No other view of this case can be maintained from the facts disclosed in the record.

The County was induced to loan this money by reason of the security thus proffered. That was the inducement of the loan. As I have shown from the records, the judges of the county court were importuned by the Railroad Company and urged to make the loan, and it is evident from the facts, to which Mr. Phillips called your attention on yesterday, that their intention was to obtain a security. They declined to make this loan without a security. They obtained that which the attorney, representing the property to be charged, assured them was a good security. This is clearly stated in Mr. Leighton's opinion, and the county judges adopted his view. The property had little or no value, except its producing capacity through its earnings. The County, therefore, said "We will obtain priority over the State, upon the earnings; for this act of 1864, provided that the State bonds shall be paid off from the income of the road." The State, by the act of 1865, relinquished its right in that regard, to an extent sufficient to secure the

interest upon the County's bonds. The operating expenses were to have priority, and the interest on the Dresden bonds was to have priority. This was comparatively a small amount upon so large a property. The Fund Commissioner's salary was to have priority. The County said, then, that "we will be paid next;" and they are assured of this payment by the power of the State. It is guaranteed to them by an authoritative act of the Legislature of Missouri. The State of Missouri acted in a double capacity in passing this act of 1865, as a *contracting party* and as *sovereign law-maker*.

It needs not that we should inquire beyond that act, if we have given to it the proper interpretation. It gave full legal authority for taking security, in the prescribed form and manner, by the act designated.

The CHIEF JUSTICE.—As I understand the case, upon your view of it, it stands in this way: The State had a statutory mortgage upon the property as security for the payment of its loan. Pursuant to the authority contained in that mortgage it had taken possession of the road and was operating it. It operated it under the security, or by reason of the lien it had upon the property, and the authority of the mortgage. It appointed a Fund Commissioner for the purpose of receiving the earnings of the road, as its agent, holding under that mortgage, and it provided for the manner in which he should pay out the earnings of the road so long as he held them. Suppose, now, that debt had been paid off; where is the obligation resting upon any one by law to receive and pay over the money to these parties?

Mr. BOWMAN.—The additional fact should be called to the Court's attention: While this act of 1864 was a taking possession by the State of this road, its property, and of its income, *it was done with the assent of the Railroad Company*—the Railroad Company formally accepting the provisions of the act of 1864.

That act gave large concessions to the Railroad Company,

to wit: it postponed (as I shall attempt to show in my argument, if time permits) by that act of 1864 the payment of the State bonds, and provided for their payment from the income of the road. Time was thus given until the road could pay them; and the terms of the act of 1864 being formally accepted by the Pacific Railroad, constituted a contract of extension.

The act of 1864, accepted by the Pacific Railroad Company, provided that the trust in the Fund Commissioner *was to continue until the seven million dollars had been repaid the State from the income of the road*, and it should be discharged from the debt. This was expressly provided in the second section of the act of 1864. After the whole debt of the State was paid from the income of the road, the County's claim would be safe; and it will be remembered that the State bonds, as disclosed by the record, were to run for a period exceeding the length of time the County bonds were to run. There were State bonds then upon the road which would not be due for over twenty-five years from that time.

That being the case, this Fund Commissioner could not be got rid of, but was to be continued, and it gave, for this reason, absolute security to the County's interest.

When the State was paid off from the earnings of the road, as was agreed the whole seven million dollars then due the State, the property must necessarily be of such value that the County could enforce the payment of its sole remaining debt of $700,000 against the Company.

Therefore, from every business point of view from which it could be looked at, it was a perfect security. There was no contingency to defeat it, except they ceased to operate the road and abandoned the right of way, leaving but a streak of rust.

But we are told that the provisions of the act of 1864 have been repealed—repealed by the consent of the Pacific Railroad, and repealed by the State, and the office of the Fund Commissioner has been abolished. But, mark you,

without the assent of the County and tax-payers of St. Louis to such repeal. The County gave no such assent. There was concededly a contract with the County, and this contract the State had no power to invalidate, as against the interests of the County, or lessen the security.

If the act of 1868 had lessened the security of the County, by abolishing the office of the Fund Commissioner prior to the time to which it was agreed that it should continue, as provided in the second section of the act of 1864, it would have been in violation of that contract, and void as against the County.

But we do not contend that it was thus void. We contend that the act of 1868, that set aside the act of 1864, was not void, for it was assented to by the Railroad, and done by the State, and the consent of the County of St. Louis was not necessary, if our position is correct. For, if our position be right, that this right of the County attached to that property, in whosesoever hands it was, it did not make any difference whether the office of the Fund Commissioner was abolished or not.

The CHIEF JUSTICE.—Do you claim, if the debt had not been paid off by the income of the road before the maturity of the bonds, that the State could not, when the bonds matured, have foreclosed its mortgage and enforced payment?

Mr. BOWMAN.—It is perfectly apparent, from the act of 1864, that they waived their right of foreclosure, and substituted therefor payment of income.

The CHIEF JUSTICE.—That is your construction?

Mr. BOWMAN.—It is; and the provisions of the second section of the act of 1864, to which I will now invite the attention of the Court, are clear and explicit. It provides:

"The office of Fund Commissioner is hereby created *and shall continue until the bonds issued for the completion of the road, and the State bonds loaned to said Railroad Company, with interest thereon, are fully paid out of the earnings*, or exchanged for

the first mortgage bonds of said road, as hereinafter provided."

The last clause is immaterial, as no bonds were so exchanged, and no such exchange would have been assented to unless the road became solvent, and then St. Louis County would have been secure.

That act of 1868 was passed, as we say, legally and properly, because it did not interfere with the rights of the county, and was assented to by the company by its purchase of the State's lien thereunder.

Three modes of foreclosing or disposing of the State's lien were provided for in the act of 1868:

1. One mode was to put the property up at public sale to any party who might bid.

2. The second was that the State should bid $8,350,000, if no one bid more, and should immediately resell the road.

3. The third mode was that as they might not release the lien, it being forbidden by the constitution, yet as this Court has held, in case of Murdock *vs.* Woodson, *they might sell the lien of the State to the Pacific Railroad itself.* That is what was done. There was a sale made of the lien to the company.

In that act of 1868 it was carefully provided that if the State became the purchaser, it should pay St. Louis County the $700,000. It is further provided that if any other purchaser bought the road, he should pay the county $700,000. If the State's lien was sold under the fifth section of the act of 1868 to the road itself, there was no provision in the act of 1868 as to the County's lien.

Why was that? Why was it that it was thus carefully provided in the other contingencies for the payment of the county, and yet nothing was said in case it sold the lien of the State to the road? The answer is perfectly plain, if we

have given the proper construction to the act of 1865, as was suggested by my associate counsel yesterday, Mr. Phillips, when this act was first presented before the County Court, the clause was simply that the Fund Commissioner should pay, &c. Afterwards the Legislature, before the final passage of the act, inserted these words: "*or such persons as may, at any time thereafter, have the custody of the funds of said railroad company.*"

Now if the State had, by an authoritative act of the Legislature, previously provided for, and made it obligatory upon any and all persons who might thereafter have in charge the same funds that were then made payable to the Fund Commissioner to continue the payments to the county, then the county could not be effected; but if a sale under the State's mortgage of 1851 actually took place, it would, to say the least, cast a shadow upon the claim of the county. But if this interpretation that we here contend for of this language, is not the correct one, then the State perpetrated a gross outrage upon the county by lessening the security, and has clearly violated the obligations of the contract made under the act of 1865. This the State had no power to do; it could pass no law impairing the obligations of a contract between private parties, much less as between private parties and the State itself. This position is fully sustained in Cooley's Constitutional Limitations, page 273, cited on page 13 of printed brief. It will be observed that the Legislature made like provision for a *portion only* of the floating debt, viz: that portion that was believed entitled to a lien not inferior to the State's lien. (See Record, p. 76; on printed brief, page 3.) It is evident the State did not intend to disregard the rights and equities of private parties in passing the act of 1868.

The Fund Commissioner was, by the sovereign power of the State of Missouri, properly exercised—first, charged with the distribution of a particular fund, and directed to make certain payments therefor to the County of St. Louis.

Could not the State impose a like obligation upon any citizen of the State into whose hands the fund might thereafter come? We contend certainly that there was this power. The State exercised its sovereign power, and delegated and made obligatory the carrying out of that trust; not only upon the Pacific Railroad, who then next assumed to receive the fund, but it has been made equally binding upon the successor corporation now operating that road, and will continue a charge upon the funds of the road until the admittedly just debt is fully paid.

Clearly this was the intent of the Legislature, and of the parties to this statutory contract. And if this Court should be satisfied that that was the *intention of the parties*, it remains but to affirm the decree of the court below.

There are two subdivisions of this case as presented in the opening argument on behalf of the appellant, that deserve notice.

The one is that the lien ceased when the office of Fund Commissioner was abolished.

It would follow, then, that there was no longer any claim as against the Pacific Railroad corporation itself, although a party to the contract. If this be the correct view, the $41,000 that has been paid the county under the decree of the court below, from earnings of the property of the railroad before the transfer, which payment was made subject to the final decision of this case, would have to be refunded, and the fund that still remains undisposed of, instead of being applied, as we contend it should, in payment to the county for the months of April, May, June, July, August, September, and October, 1876, while the road was in the hands of the court's receivers, would be payable to the road or to the third mortgage bondholders, if Mr. Day is right in his view of the matter.

It will be observed that by the order of the circuit court, on October 12, 1876, the receivers were directed to reserve in their hands, subject to the final decision of the case, a

sufficient fund to pay the $4,000 per month to the county for the period during which they operated the road, and if this decree is affirmed, then the county receives from the funds thus reserved by this order, for the payment of the county's interest, the amount that has been thus reserved for its use. (Record, p. 46.)

If the learned counsel of appellant who made that portion of the argument is correct in the position he assumed as to this branch of the case, then the Pacific Railroad could itself violate its own obligations with impunity, it is certainly a most remarkable proposition, for, mark you, this fund had accrued from the earnings before the transfer to the successor corporation. They are seeking to divert the funds prior to the time of the sale. Under what principle of equity or law can such a view be sustained? Clearly none.

But if this Court finds that it was the intention that this lien should attach to all the property known and described as the Pacific Railroad, and that everything connected with that road, so long as it continued to be used for such purposes, and not to a valueless naked corporate existence, then it is clearly immaterial whether the funds are received by the Fund Commissioner, by the Pacific Railroad of Missouri, or the Missouri Pacific Railway Company, (as the new corporation is now termed,) *they are all subject alike to the sovereign power of the State of Missouri.* The State of Missouri has created each of these corporations, and has the right to impose upon them the execution of the trust created for the county's security. It has done this by apt words in the act of 1865, and enforcement should be given thereto.

A question has been made here as to the impossibility of the separation of the funds, and it has been contended that the accretions to the road were not subject to its original lien.

It is wholly unnecessary, in view of the facts disclosed in the record, to discuss such a question. $10,000,000 of the

bonds of the State and stock subscribed by St. Louis and other counties, as shown by my associate in his opening remarks, had been appropriated and already used to build the road. The earnings of the property already acquired were abundant for the purpose. As will be seen by facts cited in my Brief, page 31, there is no question of separation involved, and none can arise.

Had time permitted, I would have read to the Court the views of my associate counsel in response to questions submitted yesterday. He has reduced to writing his views, in response to those questions, and I will ask permission to hand them in printed form to the Court.

The CHIEF JUSTICE.—If there is no objection on the other side we will receive it.

Mr. BOWMAN.—With these remarks I submit the case, regretting that the necessary shortness of time allowed does not permit that I should attempt a review of the historical facts connected with the case, which so fully support the claim to an *equitable* lien. I ask the attention of the Court to the review of the facts as set forth in the printed Brief I have submitted, and particularly to the very able opinion of Judge Dillon, given at the time of overruling the demurrer, when the case was argued at great length and carefully considered. I have been requested by Mr. Bell, the city counsellor, who is here present, to present for filing a written stipulation which has been drawn and signed, I believe, by all the counsel in the case, to the effect that if this Court affirms the decree of the Court below, the city of St. Louis, as the unquestioned successor of the County of St. Louis to the funds, may be substituted.

I respectfully submit that the decree of the Court below should be affirmed.

REPLY OF HENRY A. CLOVER

TO

QUESTIONS OF THE COURT.

Objection is made to the decree in this cause, not as to the mere form of it, but as being unwarranted by the evidence.

The decree declares the County of St. Louis entitled to an equitable lien or charge upon the EARNINGS of the said Pacific Railroad, to whomsoever the same may be transferred or conveyed, prior and paramount to any other mortgage.

The said equitable charge is decreed to exist and be enforceable on said EARNINGS OF SAID RAILROAD PROPERTY.

2. It is objected that it is utterly impossible to discover to what the so-called equitable lien attaches under the decree.

It is said, the decree contemplates an equitable charge upon the earnings of the corporation—the Pacific Railroad —without reference to, and apart from the property of the company.

It is said the decree, as well as the intervening parties, give no intimation as to the earnings of what specific railroad property is referred to.

Nor need it. It means what it says—upon the earnings of the railroad property, not specifying in detail, but declaring upon the earnings of the railroad property—all the railroad property.

But it is again stated this is not warranted by the provisions of the act of 1865 under which the claim of equitable lien or charge is asserted. It is said this act speaks of pay-

ment out of the earnings of the Pacific Railroad—that this *means* the earnings of the Pacific Railroad as a *corporation*, and *not* the earnings of the property of the corporation; and that argument could not be required to show—to demonstrate—the distinction between the earnings of an *individual*, and the earnings of *the property* of an individual—the earnings of a *railroad corporation*, and the earnings of the *property* of a railroad corporation.

The answer is—there could and can be no earnings of a railroad corporation separate and apart from its property. THE CONCEPTION IS IMPOSSIBLE. But blended with this idea—is the other idea—I say blended because not boldly put forth, that as long as (so long as) the property remained the property of the corporation, an equitable charge existed,—the mortgage existed; but so soon as the property changed ownership, the mortgage ceased to exist. This idea is couched in this language:

"If then the county acquired a lien (mortgage) upon the earnings of the corporation (the words property of the corporation are dropped out of consideration,) the Pacific Railroad, it is evident that there was nothing to which that lien could attach at the time the intervening petition was filed, or the decree made, or at any subsequent period."

Why? Because the property did not belong to the Pacific Railroad: it had been sold to another corporation.

The property, however, had not, has not, ceased to exist; but why is it said that there was nothing to which the lien could attach at the time the intervening petition was filed—20th April, 1876, (the date of sale of property was 6th September following,) because I suppose the answer to be, there was not any specific funds on hand at a particular day.

When on a particular day the Fund Commissioner had funds in hand, there was an equitable charge upon the earnings existing; when on a particular day there happened to be no funds *in hand* there was no equitable charge existing upon the funds of the road in hands of the Commissioner: there was no equitable charge existing upon the earnings. This is the argument.

The whole argument is reasoning in a circle, thus: the mortgage is upon the *earnings of a corporation*—something apart and distinct *from the earnings of the* PROPERTY of the corporation; but if the mortgage is upon the earnings of the corporation, then the mortgage ceases to exist when the corporation has sold its property to a third party.

This leads up to the examination of the propriety of that portion of the decree which declares the charge to exist not only upon the earnings of the property of the Pacific Railroad at the time the corporation remained the owner of the property, but whilst the earnings of the property came to whomsoever the property might be transferred or conveyed; and this is the question to which counsel was invited on yesterday to address attention.

Then—was it the intention of the parties, that an equitable mortgage—that a lien—that a charge upon the income—the earnings of the property of the company, the Pacific Railroad, to the extent specified should exist so long and no longer as the property out of which earnings grew, should continue to be the property of this *particular* corporation? Whatever the *intention of the parties*, this Court will give effect to that *intention* so far as no principle of law is violated thereby. What law? The law of the State where the contract was made, a law made by the State itself and assented to by the other parties—citizens of the same State, the Corporation and the County in this instance. Therefore it is wholly unnecessary to look to the general principles of the

law of Missouri relating to the doctrine of equitable liens or mortgages, for *the case stands upon a special law.* If that law of itself, intended to create and created, when accepted by the parties interested, a mortgage upon the earnings of the *property* to secure the loan, and which the parties so understood, then the rights of the parties essentially depend upon the true construction of the act of 1865. There is no question how one of the parties understood it—and that the Pacific Railroad Corporation.

The Master reports that that company for the purpose of influencing the County *as to the true meaning of the law*, gave its declaration to the County that when it, the Corporation, had expressed its assent to the law, if also accepted by the County, there would thereby be created *in favor of the County* an *equitable lien or charge upon* the earnings of the company *pro tanto* to the extent specified.

Did St. Louis county so understand?

I endeavored, on yesterday, to show that the previous relations of the parties to each other would not bear the idea that the county would loan without full security.

What was the intention of the General Assembly? Did that body intend by the passage of the act of 7th January, 1865, the Pacific Railroad might pledge the earnings of the *property* of the corporation for a loan by the county of $700,000, the relations of debtor and creditor between the parties being well understood by the Legislature, and that the next day after the loan was made under the act the Company corporation might convey all its property to other parties, and the mortgagor road, having no other property whereby earnings could be made, thereby utterly defeat and destroy the security for the loan.

A careful examination of the act of 1865, and in view as shown by there cord, of the circumstances attending the passage of the law, will demonstrate that the General As-

sembly entertained no such idea, but intended to create a *perfect security for the loan.*

If I am right herein, we have thus the intention of all the three parties clearly shown.

Why will not this Court give effect to such intention?

What stands in the way? The purchaser, as we have established, I think, was a purchaser with notice. If the Fund Commissioner, Judge Dillon, in his opinion, most aply and forcibly asks, was still in *esse*, and in receipt of the earnings of the road, can it be doubted that at the instance of the County he could be compelled by *mandamus* or other proper proceedings to pay the specified sum of each month into the county treasury?

What, he asks, has changed the rights and relations of the Company and the County?

I ask, *what has the county done whereby it has lost the right, which it once undoubtedly possessed, to a share of the earnings of the property of the company?*

Did the act of the General Assembly of 1868 do it? The County had naught to do with the passage of the act.

The act itself shows a proper solicitude on the part of the General Assembly to protect and to preserve the interests and rights of the County.

If it had intended, by abolishing the office of Fund Commissioner, *to destroy the vested rights of the people of the County in this vested security, I, for one, would deny it power to do so.* It did not do so, however, and had, in the act of 1865, expressly provided that if, for any cause, the Fund Commissioner should cease to be, that he to whom, at any time thereafter, the custody of the funds of the railroad should come, should do as he, the Fund Commissioner, was required to do.

Of this the third mortgage bondholders, complainants in this cause, had notice and knowledge.

On every principle of justice and law, the money of the

County, which went to the preservation and salvation of the road, by which it existed and has continued to exist and wax until this hour, is an equitable charge upon the earnings of the *property* of the then corporation until the maturity and payment of the principal and interest of the bonds.

Respectfully submitted by

HENRY A. CLOVER,
Of Counsel for Respondent.

Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1879. No. 242.

THE PACIFIC RAILROAD (of Mo.), - - Appellant,

vs.

GEORGE E. KETCHUM et al., - - - Respondents.

ARGUMENT FOR RESPONDENTS.

BY

MELVILLE C. DAY,

Of Counsel for Respondents.

ST. LOUIS:

...SON & BLYTHE STATIONERY CO.

SUPREME COURT

OF THE UNITED STATES.

THE PACIFIC RAILROAD, - - - - *Appellant*,

vs.

GEORGE E. KETCHUM *et al.*, - - - *Respondents.*

ARGUMENT FOR RESPONDENTS.

I.

THE FINAL DECREE IN THIS CASE, HAVING BEEN MADE BY CONSENT OF ALL PARTIES, THIS COURT HAS NO COMPETENT OR JURISDICTIONAL AUTHORITY TO DETERMINE ANY MATTERS OF ERROR THAT MAY APPEAR IN THE RECORD; OR TO DISPOSE OF THE APPEAL, OTHERWISE THAN BY DISMISSING OR FORMALLY AFFIRMING IT.

The decree in this case, under which the foreclosure sale of the Pacific Railroad was had, was made (printed record, p. 44) "*by the consent of all the parties to this suit*;" the parties having severally assented (p. 41) by their counsel of record in the case.

In considering the above proposition, it is important to examine the cases relating to the conclusive effect in an appellate court, of a decree taken by consent.

In *Webb vs. Webb*, 3 Swanston's Ch. Rep. 658 (decided in 1676), a bill of review was brought to reverse a consent decree. The Lord Chancellor is reported as having said: "But I imme-

diately dismissed the bill, and would hear no more of it; for there can be no error in a decree by consent, *consensus tollit errorem;* there can be no injustice in a decree by consent, *volenti non fit injuria.*"

In *Downing vs. Cage*, 1 Eq. cases, Abr. 165 (1699), an appeal was taken to the House of Lords from a decree made by consent, the appellant suggesting that neither he nor his counsel ever did consent to such decree; or that if counsel did, it was without his authority. The appeal was dismissed.

In *Harrison vs. Rumsey*, 2 Vesey, Sr. 488 (1752), Lord Chancellor Hardwicke said that "he would by no means set aside a decree obtained by consent of counsel on both sides, for it would be most dangerous. It was an established rule not to do it, nor would he make the precedent."

In *Bradish vs. Gee*, Ambler, 229 (1754), Lord Hardwicke again decided, that, "where a decree is made by consent of counsel, there lies not an appeal, or rehearing, though the party did not really give his consent; but his remedy is against his counsel."

In *Toder vs Sansum*, 1 Brown's Par. Cas. 468 (1775), it is stated, in the reporter's head note of the case, that, "it is a known and established rule, that an appeal does not lie against an order made by the consent of parties."

Wright vs. Nutt, 1 Term Rep. 388 (1786), is where a party had agreed that no writ of error should be brought in the case. He having died, his executor sued out a writ of error, and Ashurst, J., made a rule absolute on the attorney of the executor, requiring him to *non pros* the writ, on the ground that neither the testator or his executor *could sue out the writ* in contravention of the agreement that had been made.

In *Anonymous*, 1 Vesey, Jr. 93, the Lord Chancellor said, that a decree by consent *could not be rectified even upon motion.*

In *Christ's Hospital vs. Grainger*, 1 McNaghten & Gor. 460, 462, Lord Chancellor Cottenham said that he did not approve of permitting a party to reopen by a rehearing, a decree which he

did not at the time approve. And in the case of *Stewart vs. Forbes* (*Ibid.*), 138, where the proceedings before the vice chancellor was by consent of parties, he further said that the form of the decree rendered it *incompetent* for him to deal with the case *as an appeal.*

The doctrines of these cases, we have cited, have been frequently referred to by the courts of the different states in this country, and have been uniformly acquiesced in.

In *Winchester vs. Winchester*, 121 Mass. 127, a motion was made to dismiss the appeal and affirm the decree, on the ground that the decree had been made by consent. The court held, that an appeal from a consent decree *could not be sustained*, and so sustained the motion and affirmed the decree.

In *Ringgold's case*, 1 Bland's Ch. (Md.) 5, the Chancellor, in an elaborate opinion, as to the nature and province of appeals, said (p. 9): "As a party cannot with reason complain of the error of a judgment, which he had by his negligence suffered to go against him, or which he had expressly consented should be passed, he is not allowed to have a writ of error upon a judgment by default against him, nor where the proceeding or judgment was had by consent, or it had been agreed that no writ of error should be brought. As (p. 12) at common law no writ of error will lie from a judgment by default or by consent, so in equity, the decree or order appealed from *must have been adverse*, and not made by the express or tacit consent of the appellant; and so, when a party thinks proper not merely to decline opposition to measures which the court would enforce, but by himself or his counsel consents to a decree or order, there lies no appeal from it, even although he gave no such authority to his solicitor."

In *Armstrong vs. Cooper*, 11 Ill. 542, it was decided that a decree made by consent *cannot be appealed from, nor can error be properly assigned upon it.*"

In *Kane vs. Whitlick*, 8 Wend. 219, 226, the court said, "It has been repeatedly decided in this court, that no appeal or writ of error would lie from a decree or judment of the court of chancery, or the Supreme Court, rendered *by default.*"

Murphy vs. Insurance Co., 25 Wend. 249, is where the counsel for the appellant was present at the time of the bill being taken *pro confesso*, and of the decree being made, which authorized the sale of mortgaged premises; and the court *sustained a motion to dismiss the appeal.*

In *Monell vs. Lawrence*, 12 Johns. 521, 534, the court said, in deciding a motion to set aside a decree entered by consent of parties, "This is against the established mode of proceedings in chancery," and adopted the doctrine of the English cases, that an appeal does not lie from a decree made by consent of parties or their counsel. To the same effect is *Atkinson vs. Manks*, 1 Cowen, 691, 709, where it was said, "No appeal or rehearing lies from a decree made by consent." And in *Coster vs. Clark*, 3 Edw. Ch. 405, the court declared there *could be no appeal* from a decree taken by consent.

Gelston vs. Hoyt, 13 Johns. 561, is where the plaintiff, in the Supreme Court, where the trial was had, demurred to certain of the pleas set up in the answer of the defendant; and when the cause was called for the hearing of the issue joined on the demurrer, the defendant's counsel appeared, and declined to argue, "whereupon judgment was given for the plaintiff, on the defendant's counsel declining the argument." The defendant sued out a writ of error, and the question was considered in the Court of Appeals, whether the plaintiffs in error *could there argue* the questions arising upon the demurrer, when they had declined the argument in the court below. Chancellor Kent held that they were precluded from doing so; and assigned reasons for his opinion, that apply very aptly to this case and to the appellants, as well as to this Court, both in reference to its pressure of business, and its jurisdictional authority over this appeal. The Chancellor said (p. 575):

"1. In the first place, it is an unfair pleading, for it takes from the party demurring an advantage which he would have been entitled to in the Supreme Court, if the inclination of that Court had been against him, of withdrawing his demurrer and replying to the pleas.

"I presume this Court cannot grant such a favor. If it can, the favor would be overloaded with costs. I know of no such

precedent. It is not a case of amendment, and not within the ordinary province of a Court merely of review. A party acts against good conscience, if he will not come forward and disclose his reasons, when called upon by the proper tribunal, but reserves himself for another Court, and for the cold, hard purpose of accumulating costs, or of depriving his adversary of the opportunity of correcting his error.

"2. This point is within the reason of the decision of this Court, at the last session in the case of Sands vs. Hildreth (12 Johns. Rep. 493). There the appeal was dismissed, because the appellant did not appear in the Court of Chancery after the cause had been regularly set down for hearing, on due notice, but voluntarily suffered a decree to pass against him by default. That decision was not founded on any new principle, and it equally applies to this case. There is the same rule in the English House of Lords; and in Dean vs. Abel (Dickens' Rep. 287) *an appeal was dismissed*, without going into the merits, because the party at the hearing in chancery had made default, and suffered a decree to be pronounced against him. So, again, in a late case (2 Schoale and Lefroy, 712), Lord Eldon said it was well known as an established rule, that no point not made in the court below, could be made on appeal to the House of Lords.

"3. This is a just and wise rule. For the very theory and constitution of a court of appellate jurisdiction only, is the correction of errors which a court below may have committed; and a court below cannot be said to have committed an error *when their judgment was never called into exercise*, and the point of law was never taken into consideration, but was abandoned, by the acquiescence or default of the party who raised it. To assume the discussion and consideration of a matter of law, which the party would not discuss in the Supreme Court, and which that court, therefore, did not consider, *is, to assume, in effect, original jurisdiction.*

"It is impossible to calculate all the mischief to which such a course of proceeding would lead. Either party would then be able, in every case, to bring his question of law, as new, undiscussed points, before this court. This would indeed, be leaving the Supreme Court, with its plenitude of power, to enjoy the

otium cum dignitate in harmless repose ; but this was never the intention of the constitution. That court was created with all its competence and organs to be the great trustee, the tutelary guardian of the vast body of the common law. What good motive can a party have, who will not argue a law question in the Supreme Court, but insists on bringing it here to be exclusively discussed. It is according to the genius of our whole judicial establishment, that the Court which originally decides a cause, should be subject to review by another court; but on the plan pursued in the present case, this Court, though only a court of review, *will be the first and the last, originally and finally, to decide the law.* Why should not a party be obliged to obtain the opinion of the Supreme Court before he comes here ? How can he know but that such opinion might have saved him the expense, and us the trouble, of the writ of error ? It certainly is as much as we can do well, and I fear more than we can do with dispatch, to hear and decide questions of law after they have been maturely considered in the Supreme Court, and with the assistance of all the light and knowledge which can be imparted to the subject, from the researches of that tribunal."

Under the authority of the cases we have cited, all the authors on Chancery Practice have laid down the rule, that a consent decree is not appealable.

If a decree has been taken by consent a bill of review will not lie against it, nor an appeal.

2 Smith's Ch. Pr. 19, 50.

"A decree, made by consent of the counsel for the parties, *cannot be set aside*, either by rehearing or appeal or by bill of review."

2 Daniel's Ch. Pl. & Pr. 973.

" Where a decree is made by consent, no appeal or rehearing lies."

2 Maddock's, Ch. 576-7.

"An order or decree by consent, *cannot be appealed from*, or set aside, or modified in material particulars."

1 Hoffman's Ch. Pr. 27.

"A decree or order, made by the consent of the counsel for the parties, cannot be set aside either by rehearing or appeal or by bill of review."

1 Barbour's Ch. Pr. 373.

This doctrine, that no appeal can be taken from a consent decree, has been unqualifiedly adopted by this Court.

In *Terry vs. Commercial Bank*, 92 U. S. 454, it was held that where counsel deserts the interest of his client, fails to except to reports, and consents to the decree, that if the party would place himself in a condition where the Supreme Court can review the action of the court on that class of questions, *it must be done* by bill of review.

In *Thompson vs. Maxwell*, 95 U. S. 391, 397, this court (citing with approval Webb vs. Webb, 3 Swans. 658; 2 Smith's Ch. Pr. 50, and 2 Daniels, Ch. Pl. and Pr.) declared that "it is a general rule, that a bill of review *will not lie against a consent decree.*"

In the present case, in the decision of a motion made by the appellant, for a rule on the purchaser of the railroad to show cause why a receiver should not be appointed, etc., the Court (95 U. S. 1) virtually decided, that, as the decree had been by consent, and the sale confirmed without objection by the appellant, the appellant was not entitled to challenge the correctness of the decree, or the subsequent proceedings had thereunder.

It being then, fully established, that the decree rendered in this case, as well as all the subsequent proceedings had thereunder, are absolutely *unappealable*, it necessarily follows, that it is not competent for this court to pass upon that decree, in any of its phases, jurisdictional or otherwise; and that the only recourse left, is for this court either to dismiss the appeal, or, *pro forma*, to affirm the decree; both of which courses seem to have been adopted by the court at different times in disposing of appeals improperly taken.

If the court can consider and determine any single matter of error, that may appear in the record in this case, then, with

equal propriety, it can investigate and decide all errors or irregularities that may be found therein; and the rule that "an appeal does not lie from a consent decree" would thus be summarily and totally abandoned.

Still further, we think that we are warranted in saying, that this court is not *jurisdictionally competent*, to hear or determine any error of law that may be attempted to be raised on this appeal.

It has uniformly decided, that its appellate jurisdiction over cases appealed from the Circuit Courts, is limited to final judgments or decrees. But, if a final decree by consent is not appealable, then, in such a case, this court must stand in precisely the same attitude toward the suit, as though there had been no final decree, at all, in the Circuit Court.

Again, the position assumed by Chancellor Kent in *Gelston vs. Hoyt* (*supra*), was, that the arguing and determining on appeal of a decree made by consent, would be creating a new case in the appellate court; and such a conclusion would seem to be logically correct. This court, in *Marbury vs. Madison*, 1 Cranch, 137, in defining its own jurisdictional powers, said: "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and *does not create that cause.*"

It was claimed by Justices Catron and Daniel, in an elaborate dissenting opinion in *Steamer Oregon vs. Rocca*, 18 How. 573, in a case where a decree was given *pro forma* in the Circuit Court, because the presiding judge had been of counsel for one of the parties, that even in such a case this court had not jurisdiction to try and determine the case; on the ground that the court below had expressed no opinion, but had sent it to this court, "in effect to be moulded and settled *ab origine* by this court." There can, of course, be no parallel between a decree rendered by consent of parties, and one rendered by a judge, without giving his judicial judgment as to the merits of the controversy actually contested between the parties to the suit. But, as applied to an appeal from a consent decree, we believe that the views of Justices Catron and Daniel will be regarded as cor-

rect; that the case would be in this court "in effect to be moulded and settled *ab origine.*"

Necessarily, every point that can be raised or argued by the appellant, on its appeal, must be done originally in this Court; for in the Circuit Court it acquiesced in or specifically consented to all the proceedings.

Again, it cannot, certainly, be contended that it is in accordance with any regular process of law to appeal to this court from a decree from which "no appeal lies." But in *Dewhurst vs. Cousland,* 3 Dallas, 409, it was decided that this court had not jurisdiction to take cognizance of any suit or controversy, "which was not brought before it by regular process of law."

But it may be claimed that jurisdiction cannot be conferred upon the federal courts by consent of parties, and so that question legitimately remains open, to be considered on this appeal.

We submit, however, that a question of jurisdiction is an error of record. And though, as has been decided, it is so far a privileged one, that even the plaintiff who has instituted the suit may take advantage of it, or the court itself, before which the case is pending, may consider and decide it, even though not raised by any of the parties to the suit; still, precisely like any other error of law, it *inheres in the record of the case.* And as the Circuit Court can only decide that question when there is some SUIT pending before it, no more can this court entertain or decide it, unless upon an APPEAL, of which it is authorized or competent to take cognizance.

If the Circuit Court assumes an unauthorized jurisdiction in taking cognizance of a case, which it is not warranted in doing under the federal judicial powers delegated by Congress, so we submit, that this court would equally be assuming an unauthorized jurisdiction in entertaining an appeal in a case "where no appeal lies."

Even consent of parties, can no more confer appellate jurisdiction on this Court, than it can confer original jurisdiction on the Circuit Court.

In *Dewhurst vs. Cousland*, 3 Dallas 409, counsel presented to the Supreme Court a transcript of a case then pending in one of the circuit courts, consenting to take the opinion of this Court as to points involved in the case. The Court decided "that it could not take cognizance of it."

Mills vs. Brown, 16 Pet. 525, is where a writ of error was sued out from the final judgment of a State court. In the record, the federal question which it was sought to have decided, was not apparently raised. But both parties waived all objections to the jurisdiction, and pressed the court to decide the question. The writ of error was dismissed. Chief Justice Taney, in rendering the opinion of the court, said: "Consent will not give jurisdiction. And we have heretofore, on several occasions, said, that when the Act of Congress has so carefully and cautiously restricted the jurisdiction conferred upon this court over the judgments and decrees of the State tribunals, it would ill become the court to exercise it in a different spirit."

If, therefore, the Circuit Court had no apparent, original jurisdiction of this case, it is equally clear, that the Supreme Court has none over the present appeal. It is a conclusion which cannot be avoided by any refinement of reasoning. It may be said, that the facts or averments appearing in the proceedings prior to the decree, did not authorize the court to make the decree, either by consent of parties or otherwise; and so, that this court should so far examine such proceedings, as to determine whether the Circuit Court had the power to accept and enter upon its records even a consent decree. If a case could be appealed to this court at any stage of its proceedings, and without a final decree, there might be some force in such a suggestion. But the proceedings in a suit in any of the circuit courts are, judicially considered, a matter of entire indifference, to this Court, except when appropriately brought within its appellate cognizance. The record of such proceedings when brought here, if it discloses no final decree, is, for all efficient purposes, an anomalous manuscript; and so, if there is a decree that cannot be appealed from, the incidental proceedings, that may have led to it, are equally beyond the reach of the judicial cognizance of this Court. The final decree affords the only avenue through which the court can gain judicial access to the

errors of record. In this case that avenue seems to be effectually closed.

As illustrative of the position we have assumed, suppose a suit had been instituted in one of the federal circuit courts, between citizens of the same State, on an ordinary claim for less than five hundred dollars; and, that, against the remonstrance of the defendant, the court had retained the case, and in some regular or irregular course of procedure had rendered a decree against the defendant. Thereupon, having duly appealed, the defendant presents his case to this court, assigning the indisputable error, that the court had unwarrantably, and in flagrant violation of law, assumed jurisdiction of the case. The merest inspection of the record would disclose this error; and yet, the amount involved would preclude this Court from taking any cognizance of the case for any purpose, other than to dismiss the appeal or affirm the decree.

Winston vs. U. S., 3 How. 771.
Merrill vs. Petty, 16 Wall. 338, 345.

So far as regards the competency of this Court to pass upon them, we fail to discern any difference between the case supposed and the present one; or if there is any difference, it is not of such a character that it ought to operate to the prejudice of our position. In the case instanced, the want of jurisdictional power arises from an *implied* negation in the law defining its appellate jurisdiction; in the case now pending, it arises from the *intrinsic* character of the case, and depends upon a fundamental principle of the law, which has been uniformly acquiesced in, by the courts of England and this country, and which has now been established for over two hundred years.

We claim then, that when this court has so far examined the record of the case now presented, as to discover that the decree appealed from was by consent, it will be constrained to say that it has no jurisdiction over the appeal, and that the decree must be affirmed or the appeal dismissed.

THE APPELLANT SHOULD BE ESTOPPED FROM URGING ITS APPEAL.

We make this, not as an additional point, but as further elucidating the one already discussed.

It would be difficult to assign a reason, why the principle of estoppel should not apply with equal or even greater force to the acts or declarations of a party, solemnly entered of record in the proceedings of a case pending in court, as well as to his mere declarations made in the course of an ordinary business transaction.

In *Morgan vs. Railroad Co.*, 96 U. S. 720, 721, this court said: "The principle of estoppel is an important one in the administration of the law. It not infrequently gives triumph to right and justice, where nothing else could save them from defeat. It proceeds upon the ground, that he who has been silent as to his alleged rights, when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent."

The facts of the present case are, that the decree of foreclosure and sale was rendered by consent of all parties to the suit on June 6, 1876. In compliance with the terms of the decree, the sale was had on Sept. 6th, 1876. No objections having been made by the Company, the sale was duly confirmed on October 6. The purchaser specifically complied with all the provisions of the sale; and by deed dated October 24, 1876, all the property of the company covered by the mortgage, under which the foreclosure sale had been had, was conveyed to the purchaser. Thereupon a new corporation was organized, which received the title of the property from Baker, the purchaser; money was paid for the purchase of the stock of the same, and the new company proceeded to make and negotiate a new mortgage for the sum of $4,500,000; and both the stock and securities were at once bought and sold like any other commercial securities. During all that time, the appellant raised no voice of objection to any of the proceedings, but on the contrary expressly consented to the decree, and impliedly consented to all the subsequent proceedings. After all this had been done, and on Feb. 1st, 1877, being nearly nine months after the decree had been rendered, and over three months after the property had been conveyed, without objection, to the purchaser, the appellant under some assumed authority, derived from a meeting of a portion of the stockholders of the company, took this appeal. All of the property in controversy in the suit had, during this period of the company's consent and acquiescence in the proceedings,

passed from the custody of the court below; and under well recognized principles of this court, even a reversal of the decree of foreclosure could not affect the title of the purchaser.

Whiting vs. Bank of U. S., 13 Pet. 15.
Bronson vs. Railroad Co., 2 Black. 524, 530.
Sage vs. Railroad Co., 96 U. S. 714.

If, then, the appellant is, by reason of its own previous remissness and inaction, seeking a barren victory, its effort should receive no encouragement; if, on the contrary, a reversal of the case would in any way cast a shadow upon the title of the purchaser to the property, then, upon every consideration of justice, the appellant should be precluded from urging any proceeding that might eventuate in such results. If it was silent, as to its alleged rights, when it ought in good faith to have spoken, then it should not now be heard to speak when it ought to be silent—especially as millions of dollars have changed hands on the faith of proceedings to which no objection was interposed.

It may be again suggested, that as it has been decided by the Supreme Court that a party who has assented to the jurisdiction of the Circuit Court, is not precluded from asserting a want of that jurisdiction for the first time in this court, that the doctrine of estoppel does not apply. But it has also decided, in equally emphatic language, that a party cannot appeal from a decree to which he has assented; and it is in this connection that we invoke the application of that principle which in this case, especially, will "give triumph to right and justice."

THERE IS NO ASSIGNABLE REASON, WHY THE DECREE IN THIS CASE SHOULD NOT HAVE THE SAME CONCLUSIVE EFFECT AS ANY DECREE, RENDERED BY THE CONSENT OF A PARTY OR HIS AUTHORIZED COUNSEL.

An attempt has been made, by at least a portion of the counsel engaged in the prosecution of this appeal, in the briefs and *ex parte* statements heretofore presented to the court, to induce the belief that the decree rendered was a collusive one,

and to the intended prejudice of the rights of the stockholders of the Pacific Railroad.

If this case is to be decided on the record of the case, produced in this court, then it must be accepted conclusively, as a fact, that the Pacific Railroad did consent to the decree; and that consent was, presumptively, the consent of the entire constituency of the corporation; and to this presumption, the respondents are entitled to the unqualified benefit. Even if the counsel for the company had wrongfully consented to the decree, that would afford no ground of appeal, as shown by the cases we have already cited. And "no decree in equity ought to be reversed for matter of mere favor, and not of right."

Whiting vs. Bank of U. S. 13 Pet. 15.

But, if counsel for the appellant shall be privileged at the hearing to make declarations to the effect that the complaining stockholders are either innocent or injured parties, we desire on our part to submit the following facts, and vouch for their absolute truthfulness.

On October 12, 1875, at the instance of some of the directors of the Pacific Railroad, a meeting of the stockholders of the company was held in the city of New York, to consider its embarrassed financial condition. This meeting was adjourned to November 6, 1875; and at that time, N. A. Cowdrey, Peter Marie, Geo. R. Fearing, F. A. Otis, W. H. Morrell and Jacob Cromwell, were appointed a committee "to protect the interests of the stockholders." It appears that subsequently Morrell was dropped from the committee by resignation or otherwise, and that Robt. L. Cutting, Jr., and Jno. T. Denny were added; with these exceptions the committee has continued to exist, and to act in concert from the date of its appointment up to the present time. N. A. Cowdrey has, all the time, acted as chairman of the committee, and he and Glover & Shepley of St. Louis, have been its accredited counsel. It is my information that this committee have been ready, and have assumed, to act for any stockholders of the Pacific Railroad, who were willing to unite with them, and contribute ratably toward the expenses incurred by them; and that the expense of prosecuting this present appeal is paid out of

the funds in the hands of the committee, collected from the stockholders they represent.

The committee, by a printed report dated Dec. 15, 1875, addressed to the stockholders, stated the condition of the company, charged its directors with having acted in bad faith, and advised a resistance to the bill for foreclosure, which had been filed on the 11th of November previous. It seems that subsequently, negotiations were had between the committee and C. K. Garrison, who had become a large holder of the third mortgage bonds. This resulted in an agreement, signed by him, dated March 29, 1876, addressed to the committee, in which he agreed that if he, or any one for him, became the purchaser of the road at the foreclosure sale, then, upon compliance with certain conditions, he would give them certain interests in the property so purchased. From that date no further complaint was heard in the courts from the *aggrieved* (?) stockholders, until after the sale had been had, which was more than five months afterwards.

The decree of foreclosure was made on June 6, 1876. The stockholders, not being parties of record to the suit, could not, properly, be asked to give any consent, of record, to the decree; but, it was assumed, that they were interested in the manner and form in which it should be taken, and so one of their counsel was freely consulted; and he assisted with suggestions, and in the revising of the decree, as originally drafted by the counsel for the complainants. Subsequent to the decree, the representatives of the stockholders, and notably among them the chairman of the committee, were in frequent conference with Garrison in New York. These conferences resulted in some modification of the original agreement, concerning the terms of which the parties do not seem to be agreed. But that is not here material; for the simple fact, that some modification was made, shows that the committee knew that the decree had been made, and that they were still seeking to procure, for the stockholders they represented, some advantages to be derived through the intervention of the decree that they knew had been made, and of the sale which, as they knew, was about to take place.

The sale was had in compliance with the terms of the decree. It seems that the stockholders did not realize the advantages

they had anticipated, and so, considering themselves aggrieved, they subsequently, in behalf of themselves and of other stockholders whose stock they held in trust, instituted a suit, which is still pending, against Garrison, averring that he had failed to comply with his agreement, and "that *without their cooperation and consent*, a decree of foreclosure and sale would not have been made, or if made at all, until after a trial by the court, the result of which trial was in doubt."

The amended complaint in that case was verified April 4th, 1878, by N. A. Cowdrey, now one of the solicitors for the appellant in this case; by R. L. Cutting, Jr., who now assumes to be the President of the Pacific Railroad, and by Peter Marie, who, together with Cutting, are the securities on the bond for costs, that was given when this appeal was taken.

Such, plainly stated, are the facts relating to the attitude of the stockholders of the company toward the proceedings that have been had in this case.

These facts being disclosed, there remains not the slightest ground for the insinuations that have been made against the counsel, who appeared for the company and assented to the decree.

Even the good counsel, who has been ubiquitous in railroad foreclosure suits, as the professed champion of the "widow and orphan stockholders," ought not to complain of an act, which was, at the time, the recorded declaration of the expressed desire of all parties concerned.

Certainly, the decree in this case has been much assented to. It was assented to by the company, acting through its authorized counsel. It was assented to by the stockholders of the company, acting through their committee and accredited counsel. It was assented to by the company in its corporate capacity, and by the stockholders of the company, in a separate but organized capacity. And then, nearly two years after the decree had been rendered, the stockholders again declared their consent, by demanding a compensation for the consent they had given, and without which, as they say, "the decree would not then have been made." The party, from whom it has been demanded,

challenges their right of recovery as against him; and so these same stockholders represented all along by the same committee and counsel, now seek to make this exalted tribunal an instrument, in their hands, to vacate a decree which has been rendered by their consent, under all the solemnities that attend the procedure in the federal courts.

II.

IF THE QUESTION OF THE JURISDICTION OF THE CIRCUIT COURT, CAN BE CONSIDERED OPEN FOR CONSIDERATION ON THE PENDING APPEAL, THEN WE CLAIM THAT SUCH JURISDICTION UNQUESTIONABLY EXISTED.

As the act of Congress, of March 3, 1875, had been passed prior to the instituting of this suit, and as that act develops the full measure of the federal judicial power over "controversies between citizens of different states," as conferred by the constitution of the United States, we are clearly entitled to invoke that power, in its amplest scope, to sustain the jurisdiction in this case.

We do not understand that this court, in the case of *Meyer vs. Construction Company*, recently decided, has claimed to develop the ultimate extent of the judicial power conferred by the Constitution. If it has not, we desire to submit for consideration the following proposition, and a summary of the reasons which, as we conceive, should induce its adoption.

The judicial power, as extended over controversies between citizens of different States by the federal constitution, and as delegated to the Circuit Courts of the United States by the Act of Congress, approved March 3, 1875, *authorizes those courts, subject to the specified limitation as to value in dispute, to assume jurisdiction in all cases originating therein, in which any substantial issue is involved, existing wholly or in part between citizens of different States.*

The proper rule of interpretation of the Constitution is, "to look to the nature and objects of the particular powers, duties and rights, with all the lights and aids of cotemporary history, and to give to the words of each, just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed."

Brigg vs. Penn. 16 Pet. 610.

By reason of being phrased in identically the same language in the grant of the judicial power, the jurisdiction, over controversies "between citizens of different states," must have the same amplitude as that "between two or more states"—"between a state and citizens of another state"—"between citizens of the same state claiming lands under grants of different states"—or "between a state or the citizens thereof and foreign states, citizens or subjects."

It follows then, that any reason that can be assigned for a liberal construction of the jurisdictional power, as extended over any of these enumerated classes of cases, must, necessarily, be tributary to the construction of the particular clause of the constitution, now under discussion. For, it is evident that if a common citizenship, existing between any two parties in a suit having some adverse, though comparatively trivial interest in the controversy involved, can oust the jurisdiction of the federal courts in a case like the present one, then, it would be equally an impediment to the assuming of the jurisdiction, in each and all of the cases we have cited, as being contained in the constitutional grant of the judicial power.

Grouping the reasons that led to the grant of these powers, we find that they were as follows: As declared in the preamble of the constitution, they were "To form a more perfect union, establish justice and insure domestic tranquility."

As asserted in the Federalist (No. 80), in an article, the authorship of which is attributed to Alexander Hamilton, the power was extended to these classes of cases, because they involved the peace of the confederacy, whether they related to the intercourse between the United States and foreign nations, or to that between the states themselves: because the State tribunals could

not be supposed to be impartial and unbiassed in all such cases, and because the cognizance of such cases by the Federal judiciary was not less essential to the preservation of the public faith, than to the security of the public tranquility.

Mr. Justice Story, in his Commentaries on the Constitution, has asserted (§§ 1679, 1680), that the jurisdiction over controversies between two or more States, seemed to be essential to the preservation of the peace of the Union; that (§ 1682), it was extended over controversies between a State and the citizens of another State, to prevent practices that might have a tendency to distract the harmony of the States, and to avoid the bickerings and animosities that had previously sprung up among the members of the Union; that (§§ 1697, 1698), the jurisdiction over controversies between a State or the citizens thereof, and foreign States, citizens or subjects, was not less essential to the preservation of the public faith than to the security of the public tranquility; and it was of great national importance, in the one case, as advancing public as well as private credit in our intercourse with foreign nations and their subjects, and in the other, to avert unjust decisions against foreigners, which might, if unredressed, be regarded as aggressions upon their sovereigns; that (§1696), the jurisdiction over controversies among citizens of the States originating in claims to land under grants of different States, was intended to provide an unbiassed tribunal for the rial of such cases, with the assurance that it would have a most salutary tendency in quieting the jealousies and disarming the resentments of the State whose grant should be held invalid.

The jurisdictional power of the Federal Circuit Courts, with certain limitations, that do not apply to the present case, has now been exalted by Congress to the level of the constitutional grant. The same high motives of state policy and public justice that inspired the framers of the constitution in the creation of these powers, must now direct their construction. And, it is submitted, if in any of the classes of cases that have been referred to, whatever may be the magnitude of the interests involved, that a modicum, even, of adverse interests between two of the parties to the suit, who may happen to be citizens of the same State, can oust the federal jurisdiction, then, in all such cases, the reasons that influenced the authors of the Constitution are ignored,

and the Union is exposed to all the dangers that they apprehended and sought to avert.

This Court has already decided in *Meyer vs. Delaware Construction Co.* that the word CONTROVERSY, as used in the Constitution, is synonymous with MATTER IN DISPUTE; and that it is not material how the parties, who may be opposed in the dispute, are arranged in the suit itself.

We therefore contend, that the decisions under the Judiciary Act of 1789 are inapplicable to the proposition now being discussed. SUIT belongs to the terminology of the law, and it is technically proper to describe it as existing only and wholly between *its* plaintiffs and *its* defendants: for they are all organically a part of the elements which constitute a suit. But a CONTROVERSY, which is a MATTER OF DISPUTE, has no technical meaning. Its use was evidently adopted in the Constitution for that very reason, and because of its comprehensive import, so that the judicial power might be able to search out and embrace all possible instances of legal contentions, between the specified classes of parties, whenever Congress, in its wisdom, should see fit to authorize its exercise. It certainly, cannot be, that the framers of the Constitution, when creating a power of such amplitude, and for purposes of such transcendant importance to the life and welfare of the Union, could ever have imagined that it could all be defeated, by the fact that two citizens of the same State might happen to be opposed in interest in the particular classes of controversies, over which the judicial power was attempted to be extended. And such, we believe, will be the view adopted by the court in this case, provided the facts shall require a decision as to the ultimate scope of the judicial powers conferred by the Constitution. If the jurisdiction thus conferred shall be found inconvenient or burdensome, then the remedy lies with Congress, which it was originally supposed would delegate this power to the courts, with such exceptions and under such regulations as would obviate or remove any inconvenience that might arise from the exercise of the full measure of these judicial powers (Federalist, No. 80). The construction we contend for can do no harm; a different one may result disastrously, in some of the future exigencies of the Union.

If the court can take jurisdiction of a portion of a controversy in a suit, because existing between certain designated classes of parties, then it follows that for the effective and beneficial exercise of the *granted* power, it may also assume jurisdiction over the entire controversy, and over all the parties involved in it.

Osborn vs. Bank of U. S., 9 Wheat. 738.

If the views we have advanced are correct, then there can be no room for doubt that the Circuit Court had jurisdiction over the present case; for clearly the chief and substantial portion of the matter in dispute, existed between citizens of different states.

If, however, it shall be held that the jurisdiction created by the constitution exists only when the controversy in a suit exists wholly between citizens of different states, we still contend that such a construction is amply broad enough to sustain the jurisdiction of the Circuit Court over this case.

In the elucidation of this proposition, it becomes important, first, to determine how, and at what time the jurisdictional test is to be applied. The appellants argue that the jurisdiction is to be determined by an inspection simply of the original bill of complaint; but this view is, apparently, incorrect.

The following rules, as gathered from the decisions of this Court, even under the strict construction given to the Judiciary Act of 1789, may be considered as established, for determining the question of jurisdiction:

Whenever the court has jurisdiction as to some of the parties, but the presence of another party prevents its being exercised the impediment can be removed at any time before rendering the decree or judgment, by dismissing as to him.

Conolly vs. Taylor, 2 Pet. 556, 564.
Vatier vs. Hinde, 7 Pet. 252.
Horn vs. Lockhart, 17 Wall. 570.

Whenever the court can proceed to adjudicate, separately, on the rights of the parties properly before it, that may be done without dismissing as to other parties, whose presence in the

case, if they were affected by the decree, would oust the jurisdiction.

Gaylord vs. Kelshaw, 1 Wall. 81.
Cameron vs. McRoberts, 3 Wheat. 591.
Wormley vs. Wormley, 8 Wheat. 421.

"Formal parties, or nominal parties, or parties without interest, united with the real parties to the litigation, cannot oust the federal courts of jurisdiction if the citizenship or character of the real parties be such as to confer it."

Wood vs. Davis, 18 How. 467.
Meyer vs. Construction Co. (*supra*).

An original jurisdictional defect may be cured by amendment at any time; and by consent of parties can even be done in this court.

Kennedy vs. Ga. State Bank, 8 How. 586, 610.

This court will look into the whole case to discover whether relief can be decreed as between the parties over whom it has rightful jurisdiction.

Gaylord vs. Kelshaw, 1 Wall. 81.

In cases where the jurisdiction of the federal courts depends upon the citizenship of the parties, it is sufficient if the facts essential to support that jurisdiction appear anywhere in the record presented to this court.

Robertson vs. Cease, 97 U. S. 646.
Railway Co. vs. Ramsay, 22 Wall. 322.
Briggs vs. Sperry, 95 U. S. 401.
Bradstreet vs. Thomas, 12 Pet. 59.

In this Court, "the bill, answer and other pleadings, together with the decree, constitute what is properly considered as the record."

Whiting vs. Bank of U. S., 13 Pet. 14.

If, then, it shall appear from the record in this case, that the entire controversy existing at the time the decree was entered, or as affected by the decree itself, existed between citizens of different states, the jurisdiction of the Circuit Court over the suit is unquestionable.

The bill of complaint declared that the property sought to be foreclosed under the third mortgage, was subject to the prior lien of a "first mortgage," a "second mortgage," a "real estate mortgage" and a "Carondelet branch mortgage;" the liens of which (printed record, p. 11) were recognized by the bill.

The trustees of all those mortgages were made parties defendants in the suit; and prior to the entering of the decree they filed answers (pp. 38-9), in which they admitted that the mortgages had been made for the amounts and in the manner described in the bill of complaint; and they interposed no objection to the foreclosure. By the decree the property embraced in the third mortgage was ordered to be sold (p. 45) "subject to all prior mortgages."

It will thus be seen, that no decree was sought or made against the trustees of these prior mortgages; and so far as the interests they represented are concerned, the case stands in the same attitude as though they had not been made parties at all. They were not necessary, and it is questionable whether they were even proper parties to the suit, considering that the property was sold in subjection to the mortgages they represented.

Jerome vs. McCarter, 94 U. S. 734.

The Atlantic and Pacific Railroad Company (p. 1), "a corporation created and organized under and by virtue of an act of Congress of the United States, approved July 27, 1866, and at the several times mentioned, engaged in operating and maintaining a railroad in the State of Missouri, and authorized and empowered to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States," was also made a party defendant.

The last named company was, at the time of the filing of the bill, the lessee (p. 8) of the Pacific Railroad. This lease was, however, subsequently canceled, and prior to the entering of the decree (p. 38-9), the Atlantic and Pacific Railroad Company filed an answer and admitted all the allegations of the bill, so far as they related to itself, and interposed no objection to the granting of the relief therein prayed for: and it was in no way affected by the decree that was rendered in the case.

The only parties to the suit now remaining to be disposed of, are George E. Ketchum, the complainant, a citizen of the State of New York, who sued in behalf of himself and all other holders of the third mortgage bonds: Henry F. Vail and James D. Fish, made defendants, both being citizens of the State of New York, and who were the trustees in the third mortgage; and also the Pacific Railroad, a corporation created under and by virtue of the laws of the State of Missouri, also made a defendant in the case.

Subsequent to the filing of the bill (pp. 17, 19, 24), C. K. Garrison and James Seligman, citizens of the State of New York, and Thomas W. Pierce, a citizen of Massachusetts, all obtained leave of court to join with George E. Ketchum as complainants.

Thomas P. Akers and the County of St. Louis, stockholders of the company, under leave of court intervened in defence of the suit (p. 24), but their answer or cross bill was (p. 40) dismissed prior to the rendering of the decree.

The question then remaining to be considered is, whether the record discloses the existence of any such a controversy or matter of dispute between Ketchum, the complainant, on the one hand, and Vail and Fish, the trustees in the third mortgage, on the other, as took from the Circuit Conrt the jurisdictional power to rénder the decree in this case; it being admitted that they were all citizens of the same state.

The bill charges (p. 10) that application had been made to Vail and Fish to institute the foreclosure proceedings, but that "No such proceedings have been taken; and as your orator is informed, and believes, some doubt is expressed, whether, under said mortgage, they have the right to institute such proceedings, or any proceedings thereunder, by reason of the non-payment of the interest, due November 1st, 1875; and for such reason *prefer* not to take such proceedings; and your orator, being apprehensive that his interests, and the interest of other holders of like bonds, may be seriously affected by delay in the institution of proceedings to foreclose said mortgage and to obtain possession of said property, has brought this action on his own behalf, and on behalf of all others similarly situated, and holding like bonds se-

cured by said third mortgage, and has made said Vail and Fish defendants herein."

It is apparent, from the above averment, that no issuable controversy was stated in the bill, as existing between the complainant and the trustees in the third mortgage.

The complainant brought the suit because the trustees were unable, and so preferred not to do so. The bondholders, for the protection of their interests, had a perfect right to institute the proceedings; and if their trustees actively participated in the case at all, it was their duty to array themselves and make a common cause, with their *cestuis que trust*—the complainant bondholders.

If, cotemporaneous with the filing of the bill of complaint, Vail and Fish had also lodged, in the case in Court, a declaration to the effect that they were unable or unwilling to institute the suit, could there be any pretence that a controversy existed between them and the complainant? But, that is the precise attitude in which they are placed by the allegations of the bill. If, however, there is any lingering doubt on this point, it is still more effectually disposed of, when we inspect the answer of the trustees filed in the case (p. 40) on the 6th of June, prior to the entering of the decree, which was as follows:

"The defendants, Henry F. Vail and James D. Fish, by Noble & Orrick, their attorneys, answering the bill of complaint of the said George E. Ketchum, say: 1st. That it is true as alleged in said bill of complaint, that they are trustees in the deed of trust herein described, dated July 10, 1875, made by the said Pacific Railroad to these defendants as trustees. 2d. These defendants admit the allegations of said bill of complaint are true, as they are informed and believe. And these defendants, as trustees of the several and varied interests of the bondholders, secured by said deed of trust, submit the same to the judgment of this honorable court, that the same may be duly provided for and protected, and ask that they may have such relief, including an allowance for their costs and expenses herein, as to your honorable court may seem meet."

The above answer shows, conclusively, that these trustees were in sympathy and acting in entire accord with the com-

plainants. And, if it can be considered that they ever assumed to take any efficient or active participation in the conduct of the case, it was entirely in aid of, and in conjunction with, the complainants.

When we inspect the decree, we find nothing therein adverse to these trustees. It was recited (p. 44), that a portion of the third mortgage bonds still remained in the hands of Vail and Fish, which had been placed there, to be exchanged for "income bonds" and "improvement bonds," which had previously been issued by the company; and it was decreed (p. 45), "that any person or persons holding any of the income bonds, or the improvement bonds above referred to, be, and they are hereby authorized at any time, before the sale of said property, to exchange their income or improvement bonds, for third mortgage bonds now held by the said trustees, Vail and Fish, as is provided in said third mortgage."

The object of this clause was, simply, to enable the holders of the income and improvement bonds to exchange them for third mortgage bonds, so that they could participate in the sale in the event that the bondholders purchased the property, or in the proceeds, in the event of a purchase by a third party. It was an act to be done in the interest of the complainants; and the trustees, who had already asked the court that the varied interests of the bondholders secured by the deed of trust "be provided for and protected," assented, for the purpose specified, to continue to discharge the trust that had devolved upon them under the provisions of the third mortgage.

The only adversary proceeding then, that existed in the case, was one existing between the Pacific Railroad, whose property, was sought to be sold—a citizen of the State of Missouri on the one side, and the representatives of the holders of the third mortgage bonds, all of whom were citizens of States other than the State of Missouri, on the other side. And so we submit that the entire controversy in this case existed between citizens of different States.

And still further, it is to be noted that the Pacific Railroad is the only party, that has attempted or claimed to take an appeal to this court.

Neither Vail and Fish, nor any other of the parties have joined, or have been asked to join, in the appeal; and they make no complaint against the decree. The decree against the Pacific Railroad is the same, in all respects, as it would have been if the suit had been originally instituted by the trustees in the third mortgage. Even if there had been a contention between the complainant and these trustees as to who should institute the suit, that was a matter to be determined *in limine;* it formed no part of the main and substantial controversy in the case, and in no way concerned the rights of the company, which stood in an attitude equally adverse to both the bondholders and their trustees. So that, in any way it may be viewed, the case presents a pure and clean controversy, between citizens of different States.

III.

THE APPELLANT CANNOT CHALLENGE ANY OF THE PROCEEDINGS IN THE CASE, THAT WERE HAD SUBSEQUENT TO THE RENDERING OF THE DECREE.

These subsequent proceedings, were merely ministerial duties necessarily growing out of the final decree, which was being carried into effect, and from which no appeal could be taken.

Blossom vs. Railroad Co., 1 Wall. 657.
Whiting vs. Bank of U. S., 13 Pet. 15.
Ray vs. Law, 3 Cranch. 179.
Bronson vs. Railroad Co., 2 Black. 524.
Sage vs. Railroad Co., 96 U. S. 714.

Even if the right of appeal ordinarily existed from such proceedings, it would not lie in this case, for not having been objected to, they stand, as already shown, in the same predicament, so far as regards the right of appeal, as a consent decree. And that is the view already taken by the court in this case (95 U. S. 1).

Assuming that the property had been purchased at the foreclosure sale by Baker for himself, while still acting as the counsel for the company, that act did not make the sale void, but, at the most, it was merely voidable at the election of the party

whose interest he may have represented in the capacity of counsel.

Twin-Lick Oil Co. vs. Marburg, 91 U. S. 589.

And it is hardly necessary to argue that such election must be made by some original proceeding, and cannot be done on this appeal. But this Court has already declared (95 U. S. 1), that the sale to Baker was unobjectionable and that, "although the sale was in form to the attorney of the appellant, it was, in reality, to the bondholders in whose interest the foreclosure was had."

If the property at the foreclosure sale had sold for less than its real value, that might be a matter addressed to the discretion of the court below upon objections made to the confirmation of the sale, but would form no matter of error on appeal (13 Pet. 15).

But the fact is, that the sale was advertised (p. 59) for a period of sixty days, in newspapers of large circulation, published in the cities of St. Louis, Boston and New York; and, as the property was in the custody of the court, free access could be had by any one, to the reports of the Receivers showing the earnings and value of the property.

Separate combinations of capitalists were at the sale, bidding for the property; and it is to be presumed that the property sold for all that it was then supposed to be worth, by those who had the ability and the inclination to purchase it.

It may be, that under superior management, and in these more prosperous times, the railroad has increased in its marketable, and not unlikely in its real, value; but that is one of the ordinary vicissitudes attendant upon all financial transactions, and concerning which no man should, and a brave man will not, complain.

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